United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

75-7161

(42058)

United States Court of Appeals

FOR THE SECOND CIRCUIT

BOSTON M. CHANCE, LOUIS C. MERCADO, *et al.*,

Plaintiffs-Appellees,

—against—

THE BOARD OF EXAMINERS, *et al.*,

Defendants,

—and—

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

—and—

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

On Appeal from an Order of the United States District Court for the Southern District of New York

JOINT APPENDIX

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Attorney for the Defendant-Appellant,
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(*Additional List of Signatures Appears on the Reverse Side of this Cover*)

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UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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INDEX

	PAGE
Relevant Docket Entries	1a
Order to Show Cause dated July 10, 1974	11a
Affidavit of Peter S. O'Brien	13a
Exhibit 1—Agreement between The Board of Education of The City School District of The City of New York and the Council of Supervisors and Administrators of The City of New York. October 1, 1972—October 1, 1975	18a
Letter dated July 15, 1974, from Leonard Greenwald to Tyler, J.	19a
Intervenor's Notice of Settlement	20a
—Intervenor's Proposed Order	22a
Letter dated July 16, 1974, from Elizabeth B. DuBois to Tyler, J.	25a
Notice of Motion dated July 18, 1974	27a
Affidavit of Michael A. Rebell	29a
Letter dated July 24, 1974, from Doron Gopstein to Tyler, J.	34a
—Proposed Excessing Rules Adopted by the Board of Education	35a
Transcript of Proceedings dated July 30, 1974	36a
Order of Tyler, J. dated July 30, 1974	86a

PAGE

Affidavit of Frank C. Arricale dated July 30, 1974 .... 90a

Exhibit A—Memorandum 96a

Transcript of Proceedings dated September 13, 1974 98a

Affidavit of Peter S. O'Brien dated September 19, 1974 ..... 127a

Chart 1—Boards with Principal Vacancies 134a

Chart 2—Total Number of Supervisory Positions Excess—Boards, Central Board with Ethnic Background of Affected Supervisors 135a

Chart 3—Boards not Abolishing Positions 136a

Chart 4—Supervisory Positions Abolished and Vacancies of Predominantly Minority School Boards 137a

Chart 5—Gains in Pupil Registration 138a

Chart 6—Supervisory Positions Abolished 139a

Exhibit 1—CSA Proposed Excessing Rules for Acting Supervisors 140a

Affidavit of Frank C. Arricale dated September 20, 1974 ..... 142a

—Summary 147a

—Annual Census of Elementary and Junior High School Population 149a

Letter dated September 27, 1974, from Leonard Greenwald to Tyler, J. 150a

Letter dated September 30, 1974, from Michael A. Rebell to Tyler, J. 152a

PAGE

Letter dated October 9, 1974, from Leonard Bernikow to Tyler, J. 155a

Transcript of Proceedings dated October 10, 1974 .. 158a

Memorandum from Tyler, J., dated October 15, 1974, with Proposed Draft of an Order 215a

Letter dated October 17, 1974, from Leonard Greenwald to Tyler, J. 223a

—Draft Proposal of Council of Supervisors and Administrators Pertaining to Citywide Excessing Plan 224a

Letter dated October 22, 1974, from Jeanne R. Silver to Tyler, J. 231a

Plaintiffs' Proposed Redraft of the Draft Order on Excessing 234a

Letter dated October 22, 1974, from Leonard Bernikow to Tyler, J. 241a

Letter dated November 1, 1974, from Leonard Bernikow to Tyler, J. 243a

—Letter dated October 31, 1974 from Frank C. Arricale 244a

Transcript of Proceedings dated November 8, 1974 .. 246a

Letter dated November 14, 1974, from Michael A. Rebell to Tyler, J. 298a

Letter dated November 15, 1974, from Jeanne R. Silver to Tyler, J. 302a

Plaintiffs' Notice of Settlement dated November 15, 1974 ..... 304a

—Plaintiffs' Proposed Order 306a

PAGE

Letter dated November 15, 1974, from Leonard Bernikow to Tyler, J. 311a

Defendant Board of Education's Proposed Order 313a

Letter dated November 18, 1974, from Leonard Greenwald to Tyler, J. 316a

Intervenor's Proposed Order 318a

Letter dated November 18, 1974, from Michael A. Rebell to Tyler, J. 325a

Order of Tyler, J., dated November 22, 1974 ..... 327a

Letter dated December 17, 1974, from Leonard Bernikow to Tyler, J. 334a

Transcript of Proceedings dated December 20, 1974 .. 337a

Letter dated January 17, 1975, from Leonard Bernikow to Tyler, J. 358a

Defendant Board of Education's Notice of Settlement dated January 17, 1975 ..... 360a

—Defendant Board of Education's Proposed Order 362a

Affidavit of James Regan dated January 21, 1975 .... 369a

Letter dated January 23, 1975, from Michael A. Rebell to Tyler, J. 374a

Letter dated January 24, 1975, from Jeanne R. Silver to Tyler, J. 377a

Exhibit A—Plaintiffs' Proposed Modification of November 22nd Order 380a

Plaintiffs' Notice of Settlement dated January 24, 1975 ..... 381a

PAGE

—Plaintiffs' Proposed Counter-Order 383a

Letter dated January 27, 1975, from Leonard Greenwald to Tyler, J. 392a

Letter dated January 31, 1975, from Leonard Greenwald to Tyler, J. 394a

Memorandum-Decision of Tyler, J., dated February 7, 1975 ..... 395a

Order of Tyler, J., dated February 7, 1975 ..... 397a

Intervenor's Notice of Appeal dated February 28, 1975 ..... 408a

Defendant Board of Education's Notice of Appeal dated March 4, 1975 ..... 410a

Opinion of Mansfield, J., dated October 26, 1970 ..... 412a

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules 418a

JOINT APPENDIX

Relevant Docket Entries

Date	*Proceedings*
7-12-74	Filed Order to Show Cause why an order should not be made permitting Council of Supervisors & Adm. of City of NY etc to intervene in this action, etc. as ind. ret. 7-12-74.
7-12-74	Filed Memo. End. on Order to Show Cause. Motion granted to extent indicated by undersigned at hearing today. Settle Order. Tyler, J(mn)
7-17-74	Filed Order. Motion of CSA is granted insofar and only insofar as it seeks participation for CSA as intervenor, etc. as indicated; in all respects other than those set forth, motion of CSA is denied. Tyler, J. (mn)
7-18-74	Filed Order, of Intervenor, CSA. Motion of CSA granted, etc. same as above (mn)
7-19-74	Filed Affdvt of M.A. Rebell for an order permitting NYC School Boards Assoc to appear by counsel as *amicus curiae* in hearings, etc. ret. 7-25-74.
7-18-74	Filed Board of Examiners' Report on Results of its evaluation & examination of on-the job performance of acting supervisors in accordance with para. VI B of Final Judgment dated 7-12-74.

Relevant Docket Entries

Date	*Proceedings*
7-23-74	Filed true copy of order and opinion of the U.S.C.A. that the orders of the Dist. Court are affirmed with costs to be taxed against the appellants. Clerk docketed as judgment No. 74,615. mn
7-30-74	Filed Affdvt of Service by Michael A. Rebell for Amicus Curiae.
7-30-74	Filed Memorandum of Law on behalf of Amicus Curiae
7-31-74	Filed Order. Commencing with date of this Order & pending hearing & further Order of Court following furnishing by deft of information of items listed below; no later than 9-6-74, deft Bd of Education shall furnish to Court, the parties, etc. the following information listed. All parties shall appear before this Court on 9-13-74, 3:15 P.M. to consider what further orders, if any should be made in regard to matters set forth. Tyler, J. (mn)
7-25-74	Filed Memo End. on of 7-19-74 Motion. Motion granted. (mn)
7-31-74	Filed Memorandum of Law on behalf of Amicus Curiae.
7-31-74	Filed letter from Jeanne R. Silver to Tyler.
7-31-74	Filed Affdvt. of Frank C. Arricale for Defts

Relevant Docket Entries

Date	*Proceedings*
7-23-74	Filed transcript of record of proceedings dated 5-24-74
8- 5-74	Filed Stay of Enforcement of Final Judgment 7-12-73; Affdvt of Charles Wiener & Affdvt of Service on Pltffs & Defts Attys.
8-13-74	Filed Pltffs Memorandum in opposition to Mr. Wiener's motion for stay of enforcement and racial survey.
8-13-74	Filed Affdvt of Service by Melody Bell for pltff on Memorandum in opposition to Mr. Wiener's motion for stay of Enforcement and Racial survey on counsel for Defts and Charles Wiener, acting *pro se* by mail on 8-12-74.
8-19-74	Filed Stip & Order of Dismissal of Appeal from final order denying in all respects their motion to intervene in this action shall be dismissed. So Ordered. Tyler, J.
8-26-74	Filed Pltffs' reply to defts "Memorandum in opposition to pltffs' motion for counsel fees and costs"
8-28-74	Filed Memorandum Opinion No. 41124. Mr. Wiener's motion (movant) as described heretofore is dismissed. So Ordered. Tyler, J. (mn)
8-29-74	Filed transcript of record of proceedings dated 7-30-74
8-29-74	Filed transcript of record of proceedings dated 7-12-74

Relevant Docket Entries

Date	*Proceedings*
9-10-74	Filed Govt's Memorandum in reply to Affdvt in opposition "to motion to compel discovery.
9-23-74	Filed Deft. Board of Education's affdvt by Frank C. Arricale in support of proposed excessing rules for supervisors and to supplement affdvt, etc.
9-19-74	Filed Affdvt of Peter S. O'Brien for Intervenor CSA
9-26-74	Filed Pltffs' suppl. Memorandum regarding application of excssing rules.
10-31-74	Filed transcript of record of proceedings, dated 9-13-74
11-25-74	Filed Notice of Settlement & Order. Court's Order of 7-30-74 is rescinded & following provisions shall govern the intra-district & inter-district excessing of supervisory personnel in NYC school system, as indicated. Tyler, J. (mn) This order shall be effective retroactively to 7-30-74 and prospectively until 11-30-77.
12- 3-74	Filed Transcript of Record of Proceedings dated 11-8-74.
12- 3-74	Filed Transcript of Record of Proceedings dated 10-10-74
12- 4-74	Filed pltff's affidavit & notice of motion to modify orders ret. 12-13-74.

Relevant Docket Entries

Date	*Proceedings*
12- 4-74	Filed pltff's memorandum of law in support of motion ret. 12-13-74.
12- 5-74	Filed pltff's affidavit & notice of motion to issue an order clarifying certain previous orders entered. ret. 12-14-74.
12-16-74	Filed Affdvt of Murray Rockowitz for deft. Board of Examiners of Bd of Education of City of NY in opposition to pltffs' motion to hold defts in contempt & to modify Final Judgment 7-12-73.
12-17-74	Filed Deft. Bd of Examiners' Memorandum of Law in opposition to pltffs' motion to hold defts in contempt and to modify July 12, 1973 Consent Judgment.
12-18-74	Filed Memo End. on motion for temporary restraining order against Bd. of Education signing a consulting contract with AIR is denied. See record of proceedings today for Court's reasons. So Ordered. Tyler, J. (mn)
12-19-74	Filed Memorandum of Law in support of pltffs' motion for temporary restraining order.
12-18-74	Filed Memo. End. on Motion of 12-4-74. Motion denied without prejudice to renewal for the reasons and subject to representations explicated upon the record at hearing thereon today. So Ordered. Tyler, J. (mn)

Relevant Docket Entries

Date	*Proceedings*
12-18-74	Filed Memorandum of Law of amicus curiae in opposition to pltffs' motion re Automatic appt.
12-18-74	Filed Memorandum of Law in support of pltffs' motion to have defts held in contempt and to modify previous orders of this court.
12-18-74	Filed affdvt of Marie DeCanio for defts in opposition to pltffs motion to hold defts in contempt and to modify order.
12-20-74	Filed Affdvt of service by Michael A. Rebell, Amcius Curiae.
12-20-74	Filed deft's (Board of Examiners) affidavit & notice of motion to modifying final judgment of 7-12-74. ret. 1-14-75.
12-20-74	Filed Deft. The Bd. of Examiners Report Re: III B Exam.
12-24-74	Filed Deft. The Bd. of Examiners Affdvt of Service by Alita Kleiner.
1- 6-75	Filed Pltffs Affdvts & Notice of Motion to issue an order modifying Final Judgment of 7-12-73 against defts Bd of Examiners & Chancellor to provide a certain "Plan" annexed as Exhibit "A" to affdvt of Silver, etc.
1- 6-75	Filed Pltff's Memorandum in support of motion and opposing defts' motion to modify court's July 12, 1973 orders.

Relevant Docket Entries

Date	*Proceedings*
1- 8-75	Filed Affdvt of Service by Alita Kleiner for Deft. Bd of Examiners.
1-14-75	Filed affdvt by Saul Z. Cohen for deft Bd of Examiners in opposition to pltffs' motion & in further support of deft's motion to modify final Judgment, etc.
1-16-75	Filed Affdvt of Service by Robert Thacher for defts Bd of Examiners of true copies of Board of Examiners' Interim Report by mail on 1-15-75.
1-17-75	Filed Memo End. on motion of 1-6-75. Within applications are denied for reasons dictated to the Court reporter at conclusion of hearing thereon today. So Ordered, Tyler, J. (mn)
1-17-75	Filed Memo End. on motion of 12-20-74 Within motion is granted for reasons dictated to court reporter at conclusion of hearing today. In essence, in the appendix to the affdvt of Dr. Murray Rockowitz verified on 12-20-74 is approved. Settle Order as directed, Tyler, J. (mn)
1-17-75	Filed memo end. on motion of 12-3-74. Motion is disposed of in accordance with findings and rulings of court dictated to the court reporter at conclusion of hearing on 12-17-74. It should be added that ruling of court upon this motion is subject to conditions and provisions explicated by undersigned on record. So ordered Tyler, J. (mn)

Relevant Docket Entries

Date	*Proceedings*
1-17-75	Filed Bd of Examiners' Interim Report on results of III B exam for principal of a Day High School.
1-17-75	Filed affdvt of Leonard Bernikow for defts Bd of Education & Chancellor in opposition to pltffs' motion with regard to plan for selection of suprs within NYC School System, etc.
2- 5-75	Filed Memorandum. Pltffs' proposed counter order should be served & filed no later than 2-11-75. So Ordered. Tyler, J (MN)
2- 7-75	Filed transcript of record of proceedings dated 12-17-74.
2- 7-75	Filed transcript of record of proceedings, dated 12-20-74.
2- 7-75	Filed Opinion No. 41855. Moreover, I am inclined to think that Court of Appeals for this circuit has already adopted a different view of racial quotas, etc. I personally find rationale of this circuit more persuasive, this court is bound to follow it in any event. Tyler, J. (mn)
2- 7-75	Filed Order. Fur this order shall not be construed to prejudice or limit the excessed supervisors' rights if any, to return to vacanies in their home districts. Tyler, J. (mn)
2-24-75	Filed Deft. Bd of Examiners' Memorandum of law in opposition to pltffs' reargument motion and pltffs' proposed counter-order.

Relevant Docket Entries

Date	*Proceedings*
3- 3-75	Filed Intervenor's Notice of Appeal from order entered 2-7-75, clarifying & modifying order of 11-22-74 which rescinded Court's order of 7-30-74, etc. (mailed notice to Elizabeth B. DuBois; Jeanne R. Silver; Leonard Bernikow; Saul Z. Cohen and Michael Rebell on 3-4-75).
3- 4-75	Filed Defts. Bd of Education & Irving Anker Notice of Appeal from order of 2-7-75 which modified order of Court of 11-22-74 regarding excessing (mailed notice to Kaye, Scholer, Fierman, Hays & Handler; Elizabeth B. DuBois; Jeanne R. Silver; Frankie & Greenwald; & Rebell & Krieger on 3-5-75).
3- 6-75	Filed Bd of Examiners' Final Report of results of on job performance evaluations of acting suprs who had submitted applications by 11-8-74.
2-28-75	Filed Affdvt of Service by Robert Thatcher for Deft. Bd of Examiners on 2-27-75.
2-28-75	Filed transcript of Record of Proceedings, dated 1-14-75.
**9-10-74	Filed Notice of change of attys address of Rebell & Krieger.
**9-13-74	Filed Suppl. Memorandum of Law on behalf of Amicus Curiae.

** In error.

Relevant Docket Entries

Date	*Proceedings*
3-25-75	Filed Order modifying Final Judgment & Order. In the exercise of its continuing jurisdiction pursuant to Para XIV of Final Judgment of 7-12-73, court shall entertain appropriate applications for attys' fees and such orders as may be necessary to protect privacy of individuals or the confidentiality of test questions or to hear challenges as to constitutionality of any new test which is implemented. Tyler, J. (mn)
4- 1-75	Filed Memorandum Opinion of Tyler, J., No. 42144.
4- 3-75	Filed Stipulation by the parties.

J 1[illegible]

Order to Show Cause dated July 10, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

--against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

---

70 Civ. 4141

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Peter S. O'Brien, sworn to July 10, 1974, and the exhibits attached thereto, the complaint in this action, and all proceedings heretofore had herein, let plaintiffs and defendants show cause before this Court, at Room 501 of the United States District Court for the Southern District of New York, Foley Square, New York, New York, on July 12, 1974 at 3 o'clock in the ~~forenoon~~ afternoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure permitting the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, to intervene in this action, and for

Order to Show Cause dated July 10, 1974

such other and further relief as may be appropriate, and it is

ORDERED that service of a copy of this Order to Show Cause and the affidavit and exhibits annexed hereto shall be made upon Elizabeth B. DuBois, Esq., Legal Action Center of the City of New York, Inc., attorneys for plaintiffs personally, at their offices, 271 Madison Avenue, New York, New York, and that service hereof shall be made upon the defendant Board of Education by personally serving Adrian P. Burke, Esq., Corporation Counsel, at his office, Municipal Building, New York, New York, and that service hereof shall be made personally upon Saul Z. Cohen, Esq., Kaye, Scholer, Fierman Hays & Handler, at their offices, 425 Park Avenue, New York, New York, no later than July 10, 1974 at 5:00 P.M.

Dated: New York, New York
July 10, 1974

at 11:07 AM

H R Tyler Jr

Harold R. Tyler, Jr.
United States District Judge

Affidavit of Peter S. O'Brien

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x.

[SAME TITLE]

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

PETER S. O'BRIEN, being duly sworn, deposes and says:

1. I am the President of the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO (hereinafter "CSA"). The CSA is recognized by the Board of Education of the City School District of the City of New York (hereinafter "Board of Education") as the "exclusive bargaining representative of all employees of the Board serving by appointment or assignment under license or other pedagogical certification in pedagogical, supervisory or administrative positions in schools, bureaus, districts or central offices . . . ." As exclusive bargaining agent, the CSA is party to a collective

bargaining agreement dated October 1, 1972 to October 1, 1975, a copy of which is annexed hereto as Exhibit 1.

2. As this Court is aware, the CSA was granted on or about February 25, 1974 "the right to intervene" with respect to the transfer provisions of the CSA agreement. The aforesaid transfer provisions were enjoined by the Honorable Walter R. Mansfield as being in violation of a previous settlement of the parties which was then incorporated into an order of the Court. The CSA's appeal was subsequently rejected.

3. Under the collective bargaining agreement, the CSA is the exclusive bargaining representative for approximately 900 to 1000 acting supervisors. The acting classification includes those who were assigned prior to or pursuant to Circular 30 of the defendant Board of Education. The CSA was recognized as bargaining agent for acting supervisors after it demonstrated to the defendant Board of Education that it represented a majority of acting supervisors in each of the appropriate license fields or tenure areas. Acting supervisors were represented at all stages of the negotiations which led to the

aforementioned collective bargaining agreement and participated in the ratification of said agreement. Acting supervisors were accorded under the collective bargaining agreement equal status with personnel appointed pursuant to licensure.

4. Deponent has been made aware that there are proceedings before the Court designed to terminate this lengthy litigation. Deponent respectfully suggests that its interest is sufficient to permit it to intervene pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.

5. It should be obvious to all that one critical element of the settlement will affect or revolve around the status of the acting supervisor. One area in which the acting supervisors represented by the CSA will be involved is date of assignment or subsequent licensing. It is anticipated, because of reduced pupil register, that the coming school year (September 1974 - June 1974) will be one in which there will be meaningful reduction in the number of supervisory and teaching personnel. While an exact forecast is not possible, it is reasonable to assume

that the reduced pupil enrollment will reduce the number of supervisory positions by 150 to 300. When these positions are eliminated supervisors will be laid off or, in the educational vernacular, "excessed." The Board of Education has, as required by the collective bargaining agreement and practice, previously formulated excessing regulations. These regulations apply equally to the supervisors employed by the community boards and the Board of Education. These excessing regulations have been approved by both the courts of the State of New York and the Commissioner of Education of the State of New York. It is the CSA's position that any determination made in the settlement which sets an anniversary date of service for supervisors will affect these excessing rules. Excessing if and when it occurs will affect both licensed supervisors and acting supervisors.

6. At present there are approximately 900 to 1000 supervisors serving in some acting capacity. The length of acting service may range from six or seven years to mere days. Any final settlement of this matter must take these factors, as well as many others, into account.

The CSA respectfully suggests that its information and expertise in this matter may well serve the Court.

7. CSA respectfully suggests that none of the other parties to this action have interests equal to or compatible with the CSA's interest. I respectfully remind the Court that when the transfer provisions were enjoined the Board of Education, which was party to the collective bargaining agreement, did not appeal from that decision. The Board of Education, as an employer, cannot be deemed to have interests identical to or allied with the CSA.

WHEREFORE, the CSA respectfully requests that its motion to intervene be granted.

PETER S. O'BRIEN, as President, Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO

Sworn to before me this
10th day of July, 1974.

LEONARD GREENWALD
NOTARY PUBLIC, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1975

J 181

Exhibit 1, Annexed to Affidavit of Peter S. O'Brien

Agreement between The Board of Eucation of the City School District of The City of New York and the Council of Supervisors and Administrators of The City of New York.

October 1, 1972—October 1, 1975

(Presently before the United States Court of Appeals for the Second Circuit in the United States District Court files.)

Letter dated July 15, 1974, from Leonard Greenwald to Tyler, J.

LAW OFFICES
FRANKLE & GREENWALD

MAX H. FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011
(212) 242-0200

July 15, 1974

Hon. Harold R. Tyler, Jr.
Judge, United States District Court
Southern District of New York
U. S. Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

On behalf of the Intervenor, CSA, I am enclosing herein a proposed Order. Pursuant to your instructions, I prepared the Order and discussed its contents with counsel for all parties. The Order as submitted herein is satisfactory to both Mr. Cohen and Mr. Bernikow.

Ms Silver, however, objects and has authorized me to state that she will state her objections in writing to the Court.

'74 JUL 16 PM 1

Very truly yours,

LG

LEONARD GREENWALD

LG:bsw
cc: Jeanne R. Silver, Esq.
S. Z. Cohen, Esq.
Leonard Bernikow, Esq.

Intervenor's Notice of Settlement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (H.R.T.)

NOTICE OF SETTLEMENT

----------X

S I R S :

PLEASE TAKE NOTICE that the annexed order will be presented for settlement and signature on the 16th day of July 1974, to the Honorable Harold R. Tyler at the United States Courthouse.

Dated: New York, New York
July 15, 1974

FRANKLE & GREENWALD

By _____
Leonard Greenwald
Attorneys for Intervenor,
Council of Supervisors and
Administrators of the City
of New York, Local 1, School
Administrators and Supervisors
Organizing Committee, AFL-CIO
80 Eighth Avenue
New York, New York 10011

Intervenor's Notice of Settlement

TO:
JEANNE R. SILVER, ESQ.
Attorney for Plaintiffs
20 West 40th Street
New York, New York 10018

S.Z. COHEN, ESQ.
Attorney for Defendant Board of Examiners
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022

ADRIAN BURKE, ESQ.
Corporation Counsel
Attorney for Defendant Board of Education
Municipal Building
New York, New York 10007
Attn: Leonard Bernikow, Esq.

Intervenor's Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (H.R.T.)

ORDER

----------x

WHEREAS, defendant Board of Education has advised the Court that, due to the reduction in enrollment in various schools, it will be required to reduce the number of supervisory employees in the school system. Therefore, it will ask the Court for a determination that its proposed plan for excessing such supervisory employees is acceptable under the Court's order of July 12, 1973, and

WHEREAS, the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO (hereinafter "CSA"), is the sole and exclusive representative "of all employees of the Board serving by appointment

or assignment under license or other pedagogical certification in pedagogical, supervisory or administrative positions in schools, bureaus, districts or central offices . . .", including approximately 900 to 1,000 acting supervisors, and is a party to a collective bargaining agreement with the Board of Education dated October 1, 1972, to October 1, 1975, and

WHEREAS, the CSA moved to intervene by Order to Show Cause on July 10, 1974, in this action, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, and

WHEREAS, there was a hearing on July 12, 1974, wherein the Court heard arguments from the parties. Neither the plaintiffs, the defendant Board of Education, nor the defendant Board of Examiners interposed any objection to the intervention of counsel for the CSA on the basis hereinafter set forth, and

WHEREAS, the CSA has demonstrated to the Court its substantial interest in seeing that the rights of its members under the collective bargaining agreement are protected. Its information and expertise in this matter will well serve the Court. Accordingly,

J 24a

Intervenor's Proposed Order

IT IS HEREBY ORDERED that, pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure, the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, is granted the right to intervene for the purpose of representing the interests of its members in connection with consideration of a plan for excessing supervisory employees which will be presented to this Court.

Harold R. Tyler, Jr.
District Court Judge
U.S.D.C., S.D.N.Y.

J 25a

Letter dated July 16, 1974, from Elizabeth B. DuBois to Tyler, J.

LEGAL ACTION CENTER
OF THE CITY OF NEW YORK
271 MADISON AVENUE
NEW YORK, N.Y. 10016
(212) 679-6502

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July 16, 1974

of Directors
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D BALBER
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The Honorable Harold R. Tyler, Jr.
United States District Court
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

I am writing this letter to explain the basis for plaintiffs' disagreement with provisions of the proposed order regarding CSA intervention on "excessing" issues which has been submitted by CSA counsel. Plaintiffs were eager to agree with CSA on the form of this order and avoid burdening the Court with counter-proposals. However, after extensive discussions with CSA's counsel, Mr. Greenwald, we are unable to effect any change in one aspect of his order which we believe totally inappropriate and inconsistent with your oral ruling on the CSA motion last Thursday.

We have reference to the language in the decretal paragraph of the CSA order, and the second "Whereas" clause, suggesting that CSA is being allowed to intervene for the purpose of representing its entire membership on excessing questions rather than defending the provisions of its contract with the Board of Education on this subject.

We believe it is clear and was understood by all counsel who discussed the matter before you last Thursday that the CSA does not represent the interests of all of its members on the question of what, if any, seniority rules should be continued in the excessing of individuals as a result of cuts in supervisory positions this fall.

In the discussions last Thursday, the Court expressed appreciation of the fact that many CSA members, including the recently assigned "actings," would not require or perhaps even desire CSA representation on the excessing issue and that their position would be fairly represented by plaintiffs

J 26a

Letter dated July 16, 1974, from Elizabeth B. DuBois to Tyler, J.

attorneys. If, for example, the CSA urged that its present strict rule of excessing in order of inverse seniority be continued, it would not necessarily be representing the current interests of less senior members of its union. The interests of such individuals might, however, be presented by attorneys for plaintiffs, who will argue against application at this time of any seniority provisions incompatible with the Final Judgment in this case or the interests of plaintiffs' class, as such.

Plaintiffs consented to limited intervention by the CSA only so that it could represent its interest as a union in addressing the provisions of its contract pertaining to "excessing," and we believed that was the sole basis upon which the intervention was allowed by the Court. Accordingly, plaintiffs respectfully request that the Court not sign the proposed order submitted by the CSA and instead sign the plaintiffs' counter-proposal submitted herewith. Alternatively, we request that the Court strike from the decretal provision of the CSA order the words "for the purpose of representing the interests of its members" and strike the second "Whereas" clause of the CSA proposal.

Sincerely,

Elizabeth B. DuBois

Elizabeth B. DuBois
Jeanne R. Silver
Attorneys for Plaintiffs

EBDB:MB

cc: Leonard Greenwald, Esq.
Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.

J 27a

Notice of Motion dated July 18, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,
Plaintiffs

-against-

THE BOARD OF EXAMINERS
and THE BOARD OF EDUCATION
OF THE CITY OF NEW YORK, et al.,
Defendants

70 Civ 4141 H.R.T.

NOTICE OF MOTION

FILED JUL 22 PM 10:07
LAW DEPARTMENT

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Michael A. Rebell, sworn to on July 18, 1974, the complaint in this action, and all the papers and proceedings heretofore had herein, the undersigned will move this Court at Room 501 of the United States Courthouse, Foley Square, New York, New York on July 25, 1974 at 11:30 in the forenoon of that day, or as soon thereafter as counsel may be heard for an Order permitting the New York City School Boards Association to appear by counsel as amicus curiae in hearings before the Court concerning "excessing" and lay-off rules and regulations relating to supervisory personnel under the jurisdiction of the Community School Boards of the City of New York and to submit briefs and other papers relevant to this issue, together with such other and further relief as the Court will seem just and proper, on the grounds that the Community School Boards represented by the Association have a direct interest in the aforesaid "excessing" rules and that the Association possesses important relevant information which may aid the Court in deciding this issue.

Notice of Motion dated July 18, 1974

Dated: July 18, 1974

Yours, etc.,

REBELL & KRIEGER
Attorneys for Proposed Amicus Curiae

19 Rector Street
New York, N. Y. 10006
Tel. 212-422-4027

To:

Elizabeth B. DuBois
Attorney for Plaintiffs

Kaye, Scholer, Fierman, Hayes & Handler
Attorneys for Defendant Board of Examiners

Adrian Burke, Esq., Corporation Counsel
Attorneys for Defendant Board of Education

Frankle & Greenwald
Attorneys for Defendant-Intervenor

J 298

Affidavit of Michael A. Rebell

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MICHAEL A. REBELL, being duly sworn deposes and says:

1. I am a member of the firm of Rebell & Krieger, attorneys for the New York City School Boards Association (the "Association") and am fully familiar with all the facts and circumstances herein. I submit this affidavit in support of the Association's motion for an order permitting it to appear as amicus curiae in this proceeding on the limited issues raised by defendant Board of Education concerning "excessing" regulations.

2. The Association is a not-for-profit corporation incorporated under the laws of the State of New York. Its current active membership consists of 23 of New York City's Community School Boards. The Association was established for the purpose of representing the common interests of New York City's Community School Boards and specifically to serve as a spokesman on school decentralization issues before legislative and administrative bodies and before the Courts.

3. At a hearing held by this Court on July 12, 1974 defendant Board of Education indicated that it was drafting a plan to revise existing rules and regulations concerning the "excessing" of supervisory personnel in all the schools of the City of New York and that it would seek the Court's endorsement

of such rules consistent with the Final Judgment in this case. At that hearing counsel for plaintiffs indicated that they would probably present alternate "excessing" proposals to the Court.

4. "Excessing" is a term of art utilized in the New York City School District to refer to the discharge or re-assignment of pedagogical personnel when budgetary cut-backs or reorganizations require the elimination of positions.

5. Under the applicable New York State statutes, the Community School Boards, which are empowered to appoint and promote all supervisors and to generally "manage and operate" the elementary and junior high schools (N. Y. Ed Law Secs. 2590-e.2, 2590-e.4), are the agencies directly responsible for making "excessing" decisions. It is the community boards which must determine when (and which) positions will be eliminated and reorganized and, hence, when (and which) supervisors must be re-assigned or laid off. N. Y. Ed. Law Secs. 2590-e, 2554(2), 2590-i-8, Council of Supervisors and Administrators v. Board of Education 73 Misc. 2d 783, 785 (S. Ct, Kings Co., 1973), aff'd. App. Div., 2d Dep't (Sep't 24, 1973), unreported, appeal pending, Dkt No. 212-74, N. Y. Ct. App.

6. The issues as to what seniority rules will apply when staff members must be laid off in times of budget stringency are of critical importance to the Community School Boards which are charged with the basic responsibility for staffing patterns and school operations. Defendant Board of Education and defendant-intervenor Council of Supervisors and Administrators have in recent years attempted to impose certain uniform city-wide seniority rules for ex-

cessing situations on the Community School Boards. Some of these rules have been strongly contested by the Community Boards before the State Education Commissioner and the Courts (see, e.g. Matter of Community Board #3 11 Ed Dep't Rep 154 (1972)).

7. A number of individual Community School Boards, joined by the Association, currently have pending before the New York State Court of Appeals, an appeal as intervenor-petitioners in Council of Supervisors and Administrators, cited above at paragraph 5. The Association maintains therein that some of defendant's existing excessing rules contravene explicit powers granted to Community School Boards by law and unreasonably interefere with the management and operations of the schools under their jurisdiction. Leave to appeal was granted to the Community Boards by the Appellate Division in that case because it determined that "questions of law have arisen which ought to be reviewed by the Court of Appeals."

8. Any changes in existing excessing rules which may be proposed by the defendants or the plaintiffs herein will undoubtedly have a direct and significant impact on the statutory powers and duties of the Community Boards in this area. Furthermore, such proposals may well influence or even determine the issues in the Community Boards' pending law suit before the New York Court of Appeals.

9. As indicated above, the Association and its members have historically been deeply involved in the legal and administrative problems raised by excessing regulations. The Association respectfully submits that it is in a position to provide the Court with relevant and important information concerning

the pending State Court litigation and the administrative impact of excessing proposals on the management and operation of the elementary and junior high schools. None of the parties to this suit are in a position to supply such information.

10. On June 11, 1974, this Court denied the Association's application to intervene in this proceeding. The Association believes that its present application for standing as amicus curiae does not raise any of the difficulties which led the Court to deny intervention status. On the specific "excessing" issue which has arisen since the date of the Association's prior application, the Community Boards clearly have a direct statutory interest and a past history of involvement and State Court litigations which cannot be represented by the parties herein. Equally important is the fact that problems of timeliness and delay would no longer be a factor since the Association merely seeks to appear as amicus curiae and not as a full party, at hearings already scheduled by the parties and to submit a brief on precise issues already defined by the parties. Furthermore, it should be noted that on July 8, 1974 Hon. Thomas Griesa of this Court granted the Association the right to appear as amicus curiae and to fully participate in the trial of Rubinos v. Board of Examiners 74 (Civ. 2240), a related case challenging the New York City teacher licensing examinations. *

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* The Association did not apply for intervenor status at the current stage of the Rubinos litigation. Still pending before Judge Griesa is the issue raised by defendants as to whether joinder of the Community Boards will be necessary to effectuate any temporary or permanent relief.

J 33a

Affidavit of Michael A. Rebell

11. The Association respectfully submits that since the Court has already permitted the Council of Supervisors and Administrators to participate in the hearings relative to excessing regulations in order to defend its members' contractual rights, in all fairness, the Association should be permitted to appear to inform the Court of its members' statutory powers and responsibilities and the likely effects on the educational process in the community districts of any orders which may be issued by the Court.

12. For all the aforesaid reasons, I respectfully request that the Court grant the Association's motion to appear as amicus curiae in hearings relative to proposed changes in the "excessing" regulations.

/s/ Michael A. Rebell

MICHAEL A. REBELL

Sworn to before me
this 18th day of July, 1974.

Meyer Sigler

MEYER SIGLER
Notary Public, State of New York
No. 31-[illegible]
Qualified in [illegible] County
Commission Expires March [illegible], 1976

J 34a

Letter dated July 24, 1974, from Doron Gopstein to Tyler, J.

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JUL 24 1974
FRANKLE & GREENWALD

July 24, 1974

Hon. Harold R. Tyler, Jr.
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et. al. v. Board of Examiners et. al.
70 Civ. 4141

Dear Judge Tyler:

Pursuant to the Court's instructions at the July 12, 1974 hearing, I am enclosing a copy of the proposed excessing rules adopted by the Board of Education. There has been no change from the draft copy of these proposed rules previously given to plaintiff's attorney. I am submitting these proposed rules for Mr. Leonard Bernikow, who is presently away on a brief vacation.

Very truly yours,

Doron Gopstein
Assistant Corporation Counsel

cc: Elizabeth DuBois, Esq.
Saul Z. Cohen, Esq.
Leonard Greenwald

Proposed Excessing Rules Adopted by the Board of Education

PROPOSED EXCESSING RULES FOR ACTING SUPERVISORS WHO ARE SOON TO BE LICENSED AND APPOINTED UNDER JUDGE TYLER'S ORDERS

I. Acting Supervisors shall have no rights of seniority for excessing purposes until they have been licensed and appointed. When a supervisory position has been duly eliminated by appropriate authority, the incumbent acting supervisor shall revert to his former position.

II. Acting Supervisors selected prior to Special Circular #42 (January 17, 1972) who are subsequently licensed and appointed, shall be considered as being appointed on January 16, 1972 for excessing purposes only. Continuous acting service in title immediately prior to January 16, 1972 will be counted for seniority purposes to resolve ties.

III. For Acting Supervisors selected under Special Circular #42 (January 17, 1972) or Special Circular #30 (October 25, 1972) and subsequently licensed and appointed, the date of assignment by the appropriate authority will be the date of appointment for excessing purposes only. In cases where the date of assignment is the same, continuous acting service in title immediately prior to assignment will be counted. (Note: Acting Supervisors selected under Special Circular No. 42 or Special Circular No. 30 cannot be considered to have an assignment date earlier than January 17, 1972).

IV. No appointments will be considered valid unless they are made to true vacancies which exist on the date of appointment, and the position to which the person is appointed remains a budgeted one for at least one term.

jqrf *Transcript of Proceedings dated July 30, 1974*

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FRANKLE & GREENWALD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

70 Civ. 4141

THE BOARD OF EXAMINERS and the BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

BEFORE:

HON. HAROLD R. TYLER, JR.,

District Judge

New York, New York
July 30, 1974 - 4:30 p.m.

APPEARANCES:

ELIZABETH B. DU BOIS, ESQ.,
JEANNE R. SILVER, ESQ.,
Attorneys for Plaintiffs,

ADRIAN P. BURKE, ESQ.,
Corporation Counsel, City of New York,
Attorney for Defendant Board of Education,
BY: DORN GOPSTEIN, ESQ.,
Assistant Corporation Counsel.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, ESQS.,
Attorneys for Defendant Board of Examiners,
BY: SAUL Z. COHEN, ESQ.,
Of Counsel.

APPEARANCES (Continued):

FRANKLE & GREENWALD, ESQ.,
Attorneys for Council of Supervisors and Administrators,
BY: LEONARD GREENWALD, ESQ.,
Of Counsel.

MICHAEL A. REBELL, ESQ.,
Attorney for New York City School Boards Association, Amicus Curaie

- - -

THE COURT: Mr. Cohen, do you want to speak?

MR. COHEN: I believe Ms. DuBois would like to bring something to the attention of the Court.

MS. DU BOIS: It is a matter of the two groups of persons who have not yet been reported on, therefore will not be able to be licensed as of August 8th.

First, the group of 19 unresolved persons. They fit within the category of people who should have been given on-the-job evaluation. In fact, these persons were evaluated, but their evaluations, for some reason or other, are not completed or are unsatisfactory. There are only 19 of those people.

And as I understood what would have to happen in the fall is that I don't even know that they would have to be reevaluated but at least the panelist would have gotten

together and some sort of documentation provided for their cases.

The second category of people is the category that is referred to in paragraph 3-B of the original order. It seems to involve a substantial number of people, close to 900 by my quick calculation, or 800, but very little has to be done to them, as I understand it.

The 3-B people are people who originally passed old written Board of Examiners' examinations, but they didn't pass the rest of the process. They passed the written exams, and part of the agreement, in the settlement, was that the Board of Examiners would develop some further evaluation procedure for those people.

Mr. Cohen has indicated that both these groups should have been completed, obviously, by now, at least back in January. All I ask is that the Court set some date that the evaluations be completed in the fall.

It seems to me that we have to, I guess, do two things:

One, agree to a date; and secondly, agree, and I think Mr. Cohen can agree to this, that none of these people should suffer any prejudice by reason of the fact that they do not have a license in the fall, that their licensing has been delayed, and I'm talking about prejudice with

respect to whatever excessing, seniority or whatever other kind of thing, might happen.

In other words, I'm suggesting that if as of some date in October these people are all licensed I think that they should all be considered as if they had been licensed when they should have been and that they should not end up bearing the brunt simply because their evaluations were delayed.

I would like to suggest that for the 19 unresolved people, where very little seems to have to been done, that the Court set some date, like two to three weeks, three weeks as an outside, after August 28th, which is the date that supervisors are supposed to return to school, that those reports on those people at least be completed and then I assume the licencing will follow.

And I had trouble, I have to confess -- I mean I could come up with a date, but maybe Mr. Cohen could give some indication as to what he thinks is going to have to happen with the 3-B group, because I don't know how elaborate that would be.

I mean I would hope that that group maybe would be completed within five or six weeks at the outside.

MR. COHEN: Your Honor, first I would like to apologize on behalf of the Board of Examiners for

the failure to include that 3-B group. The failure to includ it in that report was certainly my fault. On the other hand, I was under the impression that the work had been done and I was shocked to find that that group had not been completed.

I've been told that it will be done as quickly as it can be done when school commences in the fall. But there is no one at the Board of Examiners now who can advise me as to what date would be an appropriate date to pick. Dr. Rockowitz returns, who is most familiar with this matter, returns on August 5th, and one thing we might do is to provide some period when your Honor returns where we could advise your Honor as to an expected date, because I just couldn't tell you what is a realistic date.

We can pick a date, but I couldn't give you any advice --

THE COURT: Are we talking now about the larger group or the 19 unresolved.

MR. COHEN: I don't think the August 28th date means much, because if there has to be any evaluation of the candidate himself it would have to be at a time when school itself is in progress.

THE COURT: I would so assume.

MR. COHEN: I know, because I've discussed this,

some of the evaluation that Ms. Dubois said does not have to do with a reevaluation of the candidate; it has to do with checking out, with talking to the panel, because they left off a signature or they gave a report which was contributory to something else.

They will have to go back to the panel and ask them to correct their documents.

But some of them I think will involve reevaluations, and I would imagine that cannot be done until school is open.

THE COURT: May I suggest to you, and to Ms. DuBois, that we fix tentatively a date of September 18th, which is, I believe, what you suggested, in effect, Ms. DuBois, with full rights, if Dr. Rockowitz can present some realistic reasons why not, why that can't be done, why, we will reconsider the problem later when he gets back.

MR. COHEN: Your Honor, I think that's perfectly fine and that I have no problem with it. I want to agree with Ms. DuBois' suggestion that the Court make as part of an order or a statement that people who will be -- let me back up a moment.

We intend to release the names of those persons in category C who passed and we intend to release the lists in category A that were enjoined under the original

order, so that those people as of August 8th will be able to say they are licensed. The people in category B, now, will not be able to say it until their name is released, sometime later, and we would like the Court to announce that their date will be August 8th, the same as everybody else's date, at such time as it is released.

THE COURT: In other words, that there will be no prejudice.

MR. COHEN: Right.

THE COURT: And those persons will be treated just like the published lists, which will be forthcoming on August 8th.

MR. COHEN: Right.

THE COURT: And that they will be treated exactly as those listed on August 8th even though for various reasons certain additional information can't be obtained or, in those rare instances where a complete evaluation is necessary, that is not completed until later.

MR. COHEN: That is correct.

THE COURT: The Court will so order and direct that no prejudice shall attach to this delay in respect to those persons, some 19 in number all told.

MR. COHEN: No. The category B group --

THE COURT: Excuse me. We are talking now about

3-B. I beg your pardon. We are talking somewhere between 8 and 900 persons.

MS. DU BOIS: About both categories, I think it should be clear. That seems to me fair. And we are talking about the 19 unresolved --

THE COURT: Plus the 3-B category.

MS. DU BOIS: Right.

THE COURT: That's right. I am at fault here. I started on the wrong foot. But the force of this agreement, to which the Court attaches its complete approval, for obvious reasons of equity, is that both groups should suffer no prejudice in any consideration hereafter just because their evaluations or additional information processing may cause them to be published later, that is, after the August 8, 1974 date.

Now, may I suggest, with regard to the category 3-B people, subject to the right of Dr. Rockowitz or some other knowledgeable agent of the Board to come forward and suggest reasons why not, that we pick a date in October, which to me, given the date of the opening of the school system this fall of 1974, would seem to be reasonable.

As a matter of fact, I would be willing to suggest, unless one of you tells me that there is some good reason why not, as a tentative date Wednesday, October 16th.

Did I hear a grown from you?

MR. COHEN: For what purpose?

THE COURT: I believe Ms. DuBois was suggesting that she would be willing to agree to a later date because of the great number involved and perhaps other practical problems involving completion of everybody on the 3-B list. Maybe I misunderstood her.

MS. DU BOIS: No, your Honor.

THE COURT: Didn't you suggest you would be willing to take a different approach as between the two categories?

MS. DU BOIS: Yes. I guess I would suggest something like October 2nd, again subject to Dr. Rockowitz --

THE COURT: Will you split the difference with me and make it October 9th?

MS. DU BOIS: Yes, your Honor.

THE COURT: I don't know why I presume to do this, Ms DuBois, to be perfectly frank about it, but I somehow have the feeling that that would be all right and it may be a little bit more accommodating to the authorities on the Board. But, as I say, this is all tentative, and if you feel aggrieved on behalf of the plaintiffs you will have equal right to remonstrate after we hear from the estimable Dr. Rockowitz.

MR. DU BOIS: I think that, particularly since no prejudice falls to these people, there will be no real problem between one week and another. So that is fine.

THE COURT: So we will fix those dates.

Dare I ask you, Mr. Cohen? I know everybody else's vacation plans, strangely enough, but I don't know yours.

MR. COHEN: I am going to be away during the week of August 12th, one week.

THE COURT: May I say, bully for you. Well, could it be that someone on behalf of Dr. Rockowitz could advise your office, someone in your office, or the doctor himself, for that matter, could write Ms. DuBois and me a letter addressed to one or the other, I don't care, copy to the other, indicating his views on these dates so that when I return on August 19th or shortly thereafter I will know?

MR. COHEN: Yes, sir. He is coming back to the office on the 5th, so during that week I will see that such a letter is addressed to Ms. DuBois --

THE COURT: And copy to him. All right.

Now, can we turn to the matter of excessing? And I must say, Ms. Silver, I acknowledge receipt, just as I walked in here a few minutes before 4:00, of your letter dated July 30, 1974. I am frank to say I don't fully

understand it, possibly because I only read it hurriedly. But am I to understand that the parties would agree to the order you designate alternate No. 2?

MS. SILVER: Mr. Gopstein, who has just arrived, has just informed me that the parties would not agree, your Honor, that the Board of Education was not willing to agree to what I think I accurately described as a staff negotiated agreement. So that that leaves us with a position we have expressed in our letter, which is that the facts, and I see that the Corporation Counsel has also brought in an affidavit --

THE COURT: Right.

MS. SILVER: -- with these facts. These are our facts which I believe were substantially reported to us yesterday, and it is our position that although the facts to some extent reflect a less discouraging picture than we had anticipated --

THE COURT: To put it kindly, I think it is only too true that that is so.

MS. SILVER: The impact of excessing on our class, that is, the fact that any excessinb which occurred would fall exclusively on the members of our class and the acting supervisors is unchanged by these statistics. And I think it is apparent, your Honor, from the care with

which seniority excessing is safeguarded by the defendants, despite these facts that people who are employed in the school system feel very strongly that being excess, even if it does not connote being completely laid off, is a prejudice to them, and we submit that this prejudice should not be allowed to fall exclusively on the people who have been appointed pursuant to this Court's decree.

Therefore we have recommended an alternative order, as the letter states.

THE COURT: To which the City Board of Education will not agree.

MS. SILVER: There are two proposed orders attached to this letter, your Honor.

THE COURT: I know. I'm talking about No. 2, and I just want to find out from you, do I understand correctly now that the Board of Education will not agree even to No. 2?

MS. SILVER: We do, your Honor.

MR. GOPSTEIN: Your Honor, I apologize for coming late. The Board of Education was meeting on this issue right until a few minutes before now.

The Board's position, your Honor, is, I think, reflected or supported by the facts we have included in the affidavit. I think the main position we would like to present to your Honor is that the facts as presented to

this Court a few days ago were, I think, not just slightly misleading but really bore very little relationship to the actual situation as affects excessing, because I think I should take just a moment to point to the memorandum of law, which consistently talks of excessing and seniority rules as being lay off rules, and then the only numbers we heard in the courtroom were 150, 200 possible layoffs.

THE COURT: Let me make it clear to you that you don't have to go into that. I thought I indicated beyond a per adventure at the conclusion of our hearing that there was no adequate factual basis to be sure of anything for the forthcoming fall; that the numbers were totally unknown to anybody, and that included the plaintiffs and, if I may say so, it included the City, because no one produced any salient facts and I am not blaming anybody for this.

It strikes me as only natural. No one really could be sure as of our last meeting a week ago.

I have indicated to Ms. Silver that I have no quarrel with the case law which she cites, but the problem here is a simple, age-old one, which is found all too frequently in the trial courts, that we are marvelously imbued with the capacity to receive briefs on the law but trial courts are places where the facts have got to be pretty much either agreed upon or found. Last week we

were in no shape to do either one.

Now, in the goodness of your collective hearts you suggested to me, after I made my feelings clear on that score, that you would either try to compromise this matter or, if possible, perhaps get additional facts, and to a degree you have succeeded. At least in respect to the latter we have our colleague's affidavit now, which is a little more precise than anything else I've seen so far.

What I think you are saying is two arguments:

One. Even with Mr. Arricale's affidavit we are not really certain yet as to how many people will be excessed and who those persons will be. Correct?

MR. GOPSTEIN: As to the number, your Honor, we are sure within a reasonable range.

THE COURT: Yes. But you are not absolutely positive.

MR. GOPSTEIN: Right.

THE COURT: But you don't know who those persons within that tolerable number are?

MR. GOPSTEIN: I do not know them.

THE COURT: All right. Second of all, I imagine that your argument is that this is not a great burden on the previous orders of the Court in Chance versus Board

of Education.

MR. GOPSTEIN: That is true.

THE COURT: Now, you have read Mr. Rebell's brief, I think, which he filed with us last week?

MR. GOPSTEIN: I must say, your Honor, that I have read the plaintiffs' brief. No, I have an obligation to do this, but I have not had the opportunity.

THE COURT: Mr. Rebell discusses something which is reflected in part by what Mr. Arricale says, as I glanced quickly at his affidavit. First of all, as Rebell and you have already done the last week, he makes the point that excessing is by no means the same thing as actual layoff or job loss.

Second of all, there is the point of intra-district excessing and inter-districting excessing, if you will, and those points interest me.

I'm just wondering. You see, Ms. Silver suggests the second order as an alternative, considering the distinction that I just made between intra-district excessing and inter-district excessing. The Board doesn't agree to that and I think I can understand why without even being told.

I'm wondering if the more intelligent thing to do is to simply wait and see what precisely happens. This

Court will have continuing jurisdiction to field that problem when it does happen. You see, when I put together this information with the results of these tests and the racial composition of the now qualified people as the results of these orders in the Chance case, I really seriously question whether anybody did make a showing that excessing is a problem which should be the subject of a sweeping order of this Court now, or indeed even a limited order such as Order No. 2. That's what I think the real question is before this Court.

MR. GOPSTEIN: I think, your Honor, that this has generally been the feeling of the Board after seeing some of these facts, because while we could argue about relative burdens, I think the difference between being laid off and being transferred to another supervisory position and the difference between 150 people and 225 or 35 of course speaks for itself.

There is not one of these people, according to these people who are going to lose a supervisor job, and the record of past years bears that out. This is not just mere speculation. The retirement figures and figures created by new schools makes it clear that there are more vacancies than there are excess situations.

THE COURT: If you will notice proposed order No. 2

using Ms. Silver's letter of today and her attachments as our guide, order No. 2 in substance effects forbids inter-district excessing, and that is defined to mean "any shift or transfer of an individual from one position to another whether or not entailing a demotion or layoff, because of the abolition of an identical or higher position," and then it goes on to qualify it further, "Which entail such individual's involuntary removal from the jurisdiction of the appointing authority, i.e., community school board or City Board of Education." further it proposes that inter-district excessing, which is proscribed in this proposed order, shall not include any such shift or transfer arranged by mutual consent of an affected individual and the relevant appointing authority.

Now, what does the Board say is wrong with that proposal?

MR. GOPSTEIN: I think, your Honor, that perhaps the approach that we would take is that it is really the plaintiffs' burden to, first, indicate the unconstitutional burden here. I think what we have here would be an order that limits to some extent what would otherwise be the normal functioning of the system, and we would claim that this normal functioning does not discriminate anywhere near the manner that was originally claimed and therefore it should be permitted to function in the normal manner.

THE COURT: All right.

Now, Ms. Silver, you say otherwise. How so?

MS. SILVER: Your Honor, we fully understand your concern about the fac aul picture and have attempted to accommodate to that, but we respectfully differ with the view that we have a burden of showing the factual impact before a status quo preserving order like the one we have proposed is signed here.

Judge Mansfield's transfer decision was made in the absence of any factual presentation and I think there is a sound reason for that. The facts --

THE COURT: Wait a minute. I don't agree with you on that. There was a factual basis for that.

MS. SILVER: I don't think, your Honor, that it went beyond the type of factual basis we have here, which is that in the normal course a certain number of these adjustments governed by the union contract rules are in fact made, that the union rules were developed to protect individuals who feel that some kind of seniority or other orderly provision is essential.

THE COURT: Of course. Of Course.

MS. SILVER: The facts presented by the defendant, on the other hand, are simply projections, despite the care with which they have evidently been assembled, and I thinl in the discussions between counsel

yesterday it was acknowledged that the only way we will know the real facts is to get the plans of the different community boards and the Chancellor for actual excessing, which will emerge by the end of the month.

THE COURT: Wait a moment. Wait a moment. The most precise factual statement we have in the record is in Mr. Arricale's affidavit. The first page, paragraph 3, makes two significant factual points:

First, "No supervisor has lost a supervisory position because of excessing in at least the last five years."

He goes on to add that on information and belief this has been true for the past 30 to 40 years.

But let's just take the first part.

Second, he points out, and I quote:

"It is presently anticipated that approximately 25 supervisors will be excessed in the coming semester in the entire City school district."

That is a very small number in relation to the temporaries which we have had now approved, et cetera, et cetera, as shown in the recent reports filed by the defendant Boards in this case, and I just wonder, does that permit a Federal Court to come down with a heavy hand on an already overly regulated school system, in terms of regulations and collective bargaining agreement restraints?

I just wonder.

MR. REBELL: Your Honor, may I make a point?

THE COURT: You will get your chance.

MS. SILVER: I was only prepared to yield my time to Mr. Rebell because I thought he might have specific facts.

THE COURT: Maybe he will, but let's let you finish

MS. SILVER: We feel this would not be coming down with a heavy hand. All we would be doing would be preserving the status quo until the data emerges.

Your Honor, if excessing is allowed to proceed now on an inter-district as well as an intra-district basis, it will be virtually impossible, should the facts reveal, as we expect they will, that only people in plaintiffs' class are excess. None of the facts submitted by the defendant bear at all on the issue of who will be excessed and I think that our hypothesis is compatible with the rules, is almost a sure conclusion.

THE COURT: Let me try this approach on you. Perhaps what your proposed order No. 2 is doing is simply saying: Look. Given the history and such factual development as has ensued over the years in this whole case, and the pattern of discrimination and so on found, realistically the City should now be required to live

at least with order No. 2 until September 13th, at which time this Court would be able to consider what might be done and what was intended to be done by the City, and if it turns out that it had no impact at that time, why then the City could be released.

Is that what you are saying?

MS. SILVER: That's correct, your Honor. It is our assumption that being shifted inter-district, say from the bottom of Brooklyn to the top of the Bronx or whatever, but even being shifted from one district to another, subject to a different appointing authority than the one which selected the individual and a different type of employment situation, is considered to be a negative transfer by all people in the school system, and that the facts and the rules together indicate clearly that the impact in these inter-district shifts would be probably felt by the plaintiffs' class.

It is possible, your Honor, that in the actual administration of the excessing process and the job cutting process defendants might be able to show that this impact would not be realized or would not fall unduly heavily on plaintiffs' class.

But as we understand it it is necessary for the community school boards to present on paper before the

end of the month a description of what positions they intend to cut, and it will be possible at that time to determine with exactitude the impact on the system as a whole and on plaintiffs' class of this excessing process, and we see no reason, in fairness to the members of the plaintiffs' class, why the ultimate implementation of those decisions cannot be delayed until that data is presented.

We also believe that --

THE COURT: All right.

I've got you.

Now, How about CWA? Do they want to be heard on this?

MR. GREENWALD: No. I represent the CSA.

THE COURT: I mean the CSA.

MR. GREENWALD: Not the Communication Workers.

THE COURT: I had my dealings with them earlier today.

MR. GREENWALD: I can imagine.

THE COURT: So forgive me.

The CSA. What is your insight into all this?

MR. GREENWALD: Since our original information, and in addition the information Mr. Arricale supplied us yesterday plus samplings that we have done over the past couple of hours and late until last night, based on

incidents of districts in which we expected the highest excessing to occur because of budgetary problems in the proceeding here, we don't believe there is going to be any excessing in September.

THE COURT: In other words, you wouldn't even accept Arricale's figures?

MR. GREENWALD: Mr. Arricale told us he is talking about probably 25, a leeway of probably five or ten each way. We believe that there is going to be much less than 25 excessed individuals. We have also checked and found out, which we have always known, that in the last 40 years approximately, give or take, there has been no supervisor who as a result of excessing has been demoted or reduced to a non-supervisory position.

Moreover, as far as I've been able to learn, since approximately 1949 there have been a handfull, perhaps two or three, supervisors who have been taken out of their original license as a result of excessing.

In other words, going from an assistant principal, he had to be excessed and they may have placed him, because of his abilities, as a supervisor or in guidance. He has been out of his licensed area but not out of the supervisory role.

So we believe that excessing for all practical

purposes is not going to occur with any significance for the school year.

THE COURT: All right.

MR. GREENWALD: And of course we would on matters of principle, because I think we are dealing not only with an overregulated but a traumatized school system, object to any stay, though we agree in a sense to order 2. We just believe that between now and the opening of school the facts will develop such that we don't think there will be any need for any excess court involvement. We just don't believe that excessing, which we really initially concerned ourselves with, is really any real problem this year.

MS. SILVER: Your Honor, may I respond to something Mr. Greenwald said?

THE COURT: Yes.

MS SILVER: I think that his comments reflect a sort of a flaky factual area between him and the defendants. Mr. Greenwald has said very clearly that people have not been demoted or reduced to non-supervisory positions. That means a reduction from the status of supervisor to teacher. But he indicates that a handfull have indeed been reduced to lower or different supervisory positions.

Under the currently prevailing system, if a supervisor is placed in a difference license, his opportunity to obtain a license as a result of on-job evaluation is seriously jeopardized.

Certainly, if he is demoted, he is in an unfavorabl. position.

Now, I just want to say one other thing. There is an alternate 2 order we discussed for three hours yesterday among all parties. And while obviously that does not bind Mr. Greenwald, Mr. Gopstein or Mr. Rebell's clients, I do think that the fact that all counsel agreed to the principle of this order does say something about the fairness and the feasibility of it, and I hope that these things will be considered by your Honor in making a decision.

MR. GOPSTEIN: Your Honor, could I make one comment about this? Because I would object most strongly to citing discussions and negotiations between counsel that are subject to the approval of their clients as some point to be used later on. I thought the whole point of settlement negotiations was just that, to arrive at an amicable settlement. But I made it clear that this was all subject to the approval of my client.

THE COURT: Oh, yes. I understand.

MR. GOPSTEIN: I would also say as far as the precision of the figures are concerned, whether it is 25 or 10 or 35, Mr. Arricale made it very clear in our discussions yesterday that he had personally talked, or had to, to 20 or 21 of the school boards. These figures are not made out of whole cloth.

And as to the other school districts, there are substantial bases for projections. In fact, he cited one school district, District 26, which probably has the worst situation right now, being in a deficit situation. And when they came and said that they might only have to excess two positions, he himself was surprised by that number and checked on it himself and verified that this was the number.

So these are more than just projections, these numbers. They are quite accurate.

THE COURT: Mr. Rebell, what do you think about all this?

MR. REBELL: Well, sir, I would like to just briefly make a comment on the facts. I am sorry that we were presented with these figures late yesterday. I haven't had an opportunity to canvass the community boards, but one thing I think I can point out to your Honor, and I believe it is highly irrelevant, is that

the last year in which there were heavy budget cuts, namely 1972-73, the facts as presented in Mr. Arricale's affidavit for that year are somewhat misleading because they do not take note of the fact that there was an injunction from the State Supreme Court against both layoffs and further excessing of personnel.

In other words, the record in the state excessing case as cited in my brief shows that people would have been laid off that year if not for the injunction and heavier numbers would have been involved. And in addition I might point out that the budget cuts this year are expected to cut deeper than they did in '72-73.

So offhand, I am not sure whether the figure of 25 is solid. But beyond that, I would state, your Honor, that we are in agreement, on a compromise basis, with order No. 2 that the plaintiffs have proposed --

THE COURT: Yes, I would think you would, because that's why, you remember, I referred to your brief. Your brief represents the most lucid statement prior to today on the differences of impact between intra-district and inter-district excessing, and for that reason I found it very useful in my thinking about this since I saw you last week. And I was going to ask you:

I would assume from what you said in your brief that you

would have and your clients would have no trouble with living with Ms. Silver's proposed order No. 2.

MR. REBELL: I would like to point out in that connection, your Honor, that the kind of nebulous alternative being proposed here, allowing us to gather facts in September without a court order, would be totally detrimental because these inter-district assignments would be made late in August and it would probably be too late to undo them by September 13th, whereas in the alternative, if we delay everything until September 13th, all you are talking about is two weeks and all you are really talking about is a few thousand dollars of salary that would be paid from a central fund that already exists for that purpose.

So you have a minimum disruption under the proposed order 2 in comparison with possibly severe disruption if you should allow these inter-district placements to be made and then on September 13th, if the facts so warrent, attempt to undo what has already been done.

And I might point out in addition, as was mentioned in my brief, I believe there were serious considerations in relation to the licensing plan that will be before your Honor in September, as to whether the inter-district excessing is not incompatible with that in addition to its incompatibility with the seniority issues that plaintiff

raises today, and for that reason also I think it would be wise to hold the situation in abeyance.

THE COURT: When you say, "Hold the situation in abeyance," you mean this Court should sign something akin to proposed order No. 2?

MR. REBELL: Yes.

THE COURT: All right. Let me ask you, Ms. Silver, was there any specific reason in your mind or whoever's mind it was that suggested September 13th?

MS. SILVER: There was a specific reason, your Honor. It is the belief that the plans and decisions with regard to the actual pattern of position cuts by community school boards will be made by the 30th of August and the date September 6th would allow the defendant to prepare the information that is required in the second paragraph of the proposed order or to be sure that some of plaintiffs' counsel are back in the City, and the hearing date would allow both the plaintiff and the Court to digest that data and come up with an ultimate solution of the problem.

THE COURT: All right.

Now, Mr. Gopstein. I think you wanted to say something further.

MR. GOPSTEIN: I object to the question of the interest of the community school district that Mr. Rebell

represents, I think there is a very serious question whether he can properly make this argument before this Court, and I would like to draw the background on that.

The community school districts, first of all, are represented in a consultative council that meets with the Board of Education.

But more importantly, your Honor, the issue of powers of the community school district under the decentralized system is a very different issue than the one properly before this Court, that is, any discriminatory action against the individual plaintiffs.

MR. GOPSTEIN: And under the decentralization law of New York State the community school boards are bound by the collective bargaining agreement negotiated by the Central Board, and that agreement provides specifically for the kind of excessing situation which the community school boards are therefore bound by.

To come into a Federal Court and argue what I think is clearly a state law issue and maybe get a second shot at it, I can understand that --

THE COURT: Wait a minute. Maybe I can't read Mr. Rebell's mind and maybe that's his client's intention through him; I wouldn't know. I allowed him, as you know, to appear as amicus curaie, so to speak, even though I

wouldn't let his clients intervene. Now, I'm only interested in getting such expertiese as I may from him on the nuances of the school system, to be sure, as seen perhaps by the eyes of his client. But we are not arguing a State Court issue here. I trust that you will accept that. I haven't the slightest interest in grafting anything more into this ancient controversy than we already have.

It is like a conflagration that one puts out in one department and then suddenly a new fire breaks out somewhere else. It has been true for four long years now. We know that, and you know it better than I.

All I'm concerned about is that I got some aid in understanding from Mr. Rebell, and I am not falling for any idea that we are going to have some kind of re-litigation of some State Court issues here which I am not competent to decide and I am not qualified or permitted by the law to decide. So there we are.

Now let me hear you on something more significant. I am very troubled, and I agree with your apparent argument, that it may well be that when everything is shaken down here that there will no significant impact on the plaintiffs' class in this case by any excessing in the fall of 1974.

On the other hand, I am impressed with two points.

It would seem to me that, as Ms. Silver argues,

it is more than likely that any excessing, even if it is in a number of, let's say, 25 or 35 or 15, would tend to fall on the class represented by plaintiffs in this lawsuit.

Second of all, it would seem to me that if there is a safety valve, meaning by that that if there is a hearing after the events of August 30th, let us say, and the first few days of September, which are really chaotic ones for any school system and certainly one as large or diverse as that of the City of New York, after all that shakes down it may well be that then it will be determined that whatever happened this year would be of no burden or any moment to the class which is bringing this suit and whose interests must be protected by the Federal Court from any overspill from ancient discriminatory practices and procedures followed by the City and by the unic agreements here.

Also, the third point that impresses me, and I must say that nobody really explained it to me until Mr. Rebell did, and it wasn't until I read his brief that I understood really what the distinctions were and what the distinctions meant in terms of excessing -- I don't think anybody here has argued that Mr. Rebell is wrong, and he makes the point, and as a matter of fact the definition proposed by Ms. Silver in her proposed order No. 2 really

tracks what Mr. Rebell has pointed out in his brief.

I regard that as an informational point, not as a submission to re-litigate some great State Court case here in New York of which I really know nothing.

In other words, what I am saying, Mr. Gopstein, is that it may well be that the City could establish on September 13th or some other suitable date in September that that order or something like it really has no basis either now or for the future.

MR. GOPSTEIN: I think it comes down, your Honor, to deciding whether that would be established on September 13th or it could be established with reasonable certainty now. And --

THE COURT: That is the point I tried to make earlier. I cannot but agree with Ms. Silver's point that we would have to assume, with what we know now, that even if there is very few excessing, I will take 25 or I'll take 10 more or 10 less, I would assume therefore, whether it is 15, 25 or 35, the bulk of the people who would have to be affected, I would assume, are the persons whose interests are those of the class in this case. I don't see how you can avoid that strong presumption.

MR. GREENWALD: Your Honor, may I supply some information in that area?

THE COURT: Well, you may, but let me give him a chance.

MR. GOPSTEIN: I would say first, your Honor, that, again, and of course your Honor is aware of this, but they would not be losing jobs.

THE COURT: No, no. I understand you

MR. GOPSTEIN: And I am wondering whether, assuming it is a burden of sorts, it really rises to a level than would justify it appearing in a court order.

THE COURT: I think what Ms. Silver is saying, and I think if she is I would agree with her, is that given the history of this lawsuit and given the relief which this Court has already afforded, it is at the very least ancillary to supporting that relief already granted that there be no further unnecessary burdens which can be said to have stemmed back in whole or in part to the original prejudice which this Court found on racial grounds.

Isn't that what you are arguing?

MS. SILVER: That is correct, your Honor. I must point out that in the case of the transfers there was also no loss of jobs. It was the discriminatory impact of a preference.

THE COURT: I get that point and I got it early on. Believe me. You could argue that, well, transfer is

one thing and excessing is another. But in effect what you are saying is that no, they are not, because what happens is that on excessing you will say I agree with Mr. Gopstein and I agree with the CSA. I agree with the board: excessing doesn't necessarily mean layoffs and presumably will not, given the historical record here.

But it does mean going from the bottom of Brooklyn, as you put it, to the top of the Bronx, which many people would find burdensome.

MS. SILVER: It is analogous to the situation a man would be in if he had a job in one district in the state and got laid off there but he was told that he could have a job in some other district in the state, not necessarily chosen by him. That is really what it comes down to.

THE COURT: We can't really be sure of all that. I wouldn't want to bore you with some thoughts I might have how some men might like that, too. But we can't figure that out.

MS. SILVER: May I interject one other consideration that may not have been sufficiently mentioned yet? It is reflected in the provision of paragraph three of this proposed order on page 3, which may on the face of it seem a bit obscure, but what it comes down to is this:

The proposed excessing rules of the Board of Education, to the extent they extend seniority relative to the other members of the acting class to acting personnel, do so only as of the time when they first get licensed and, second, get appointed.

We are very familiar with the delays and problems which will result in a lot of people not being licensed through no fault of their own.

In addition, it is the Board of Education's view that in order for people to be appointed after they are licensed, the appointing authorities will have to take formal action, presumably in public meetings, to make those appointments.

This makes it absolutely inconceivable, if the Board's proposed excessing rules are implemented, that any of the plaintiffs' class, or at least any significant number of plaintiffs' class and a larger group of actings. would be eligible to have seniority relative to each other.

So although I'm sure the Board would not intend this, as of this fall the extension of excessing rules to acting under their proposed orders is really a fantasy, and that is another reason why we think that the information as to how this is going to operate on real people in the actual world should be available before inter-district

excessing, which in our persistent view is very serious to individuals affected, is implemented.

THE COURT: All right

MR. GREENWALD: Your Honor, may I address myself to your question as to whether excessing will fall on the class this Court has special cognizance of or not? Frankly, I think we have to distinguish between licenses. For broad purposes there are school licenses -- that is, principal, assistant principal, chairman, administrative assistant -- and there are other licenses, supervisor attendance, guidance, early childhood development, emotionally disturbed children, which are not school based licenses in that they are not individuals whose responsibilities connect on a daily basis with the school.

As I understand it, the overwhelming majority of the acting class, and I think with great emphasis those of the minority group members of that class, are in school licenses.

The likelihood, under our situation as we understand it today, of any school licensed person being excessed is almost remote.

We are talking about excessing in licenses with some community boards, the Central Board, considered non-school.

For example, a school board faced with something of a crush may decide to get rid of one attendance officer, may excess a supervisor of guidance or a music supervisor. In 1973 - 74, the situation Mr. Rebell was talking about, we brought the action and got a stay.

THE COURT: I know. But that is going off the point. I am only dealing with 25 persons, 10 more or 10 less as suggested by Arricale. He is not talking about music supervisors.

MR. GREENWALD: Yes, he is.

THE COURT: No, he isn't; not necessarily at all.

MR. GREENWALD: I'm saying that my information would be such that, whether it is 25 or 10 or 35, the overwhelming majority of those will not be school connected licenses. That's what I'm saying.

THE COURT: I can't say to you categorically that it is different. I don't, of course. But I have to assume now that a good many of these people would be school licensed people, as you say. How can I assume otherwise?

MR. GREENWALD: Because let me just say, from Mr. Arricale's figures in '73-74, the situation which I was involved in, almost all of those excess supervisors were not school licensed people. They were --

THE COURT: There is nothing here in the record to prove that.

MR. REBELL: I would object to that on factual grounds.

MR. GREENWALD: You know they were supervisor of music?

THE COURT: Whether they were or not, gentlemen, that is not indicated under oath or in any other way. We don't have any such information.

MR. GREENWALD: I just want to indicate to the Court it would be the natural concern of school districts to maintain school licensed people in their function whilst, if excessing occurs, excessing non-school licensed people. And that has been the history of excessing, as far as I know.

THE COURT: All right. I am going to take a short recess here and come back here.

(Recess.)

THE COURT: Ladies and gentlemen, the problem of excessing, which was originally raised obliquely in this case, curiously enough by no one other than counsel for the City Board of Education, triggered last week an application by the plaintiffs to have this Court here and determine that any excessing of licensed positions in the school year of 1974 opening effectively for our purposes in this context on August 30th of this year, be

prohibited.

A hearing was held last week, I believe it was on Thursday, July 25th in the morning and then it continued over for a brief bit in the afternoon, at the conclusion of which this Court indicated, at least as an informal matter, that there was no particular adequate record factually as to just what excessing, if any, would be accomplished by the City school system this fall.

Therefore the hearing was continued with the understanding that either counsel would try to work out a solution amicably by stipulation, which would be approved by the Court, or alternatively that further information would be brought to the Court's attention today in the continued hearing.

In fact, it has developed that despite the efforts of counsel, ending apparently yesterday, no such amicable stipulation could be worked out.

As a result, today the Court is in receipt of some additional information, most particularly that contained in a letter of Jeanne R. Silver dated today and, perhaps even more pointedly in the projection of facts sense, in an affidavit of Frank C. Arricale, who is Executive Director of the Division of Personnel of the Board of Education of the City School District of New York City. That

affidavit is verified today as well.

The facts still are not precise, and inevitably this is true because no one at this point can be sure exactly what personnel or what licenses will be excessed because of budgetary limitations in late August and early September 1974.

However, Mr. Arricale projects that approximately 25 supervisors will be excessed on the coming semester, that is, the fall semester, in the entire City school system or district, as it is called. He admits that that is an approximation, it could be within 10 numbers less or within 10 numbers greater.

It has been argued here by counsel from the CSA today that the CSA doubts that there will be any great number and more likely 15 or less. Well, the point really is that none of us can be sure of the facts today.

The plaintiffs have suggested two orders to this Court, the first, or Roman numeral one orders as proposed by Ms. Silver for the plaintiffs would prohibit any excessing in effect by the City school system.

This court declines to enter such a sweeping order for the reasons that there are no facts of any certainty that would support such sweeping relief, and furthermore the Court concludes that such a sweeping order

would undly hamper the City school system in trying to comply with its own regulations, with the New York statute and with its collective bargaining agreement with supervisors or principals.

Proposed order No. II as submitted by plaintiffs is somewhat more reasonable and certainly more limited. It nevertheless presents, as anything else in this case seems to present, its troublesome and obscure aspects. No one knows what type of persons will be excessed, whatever the number thereof may be.

By that I mean we don't know whether they will be principals or assistant principals or, as counsel for the CSA has suggested, supervisors of music or supervisors of some other subdivision of a school. We just do not know.

On the other hand, plaintiffs have argued, and I understand this argument, that there is reason to presume that to the extent any licensed positions are excessed a goodly number of that group could well be the very class represented by the plaintiffs in this lawsuit.

With that presumption there is also the presumption that if that were to occur it may have its origins, to at least an extent, in the discriminatory practices heretofore struck down by orders of this Court in this very case.

Another factor to consider is that, as I believe

everybody would agree, although only several of the parties here being heard have pointed out, that a limitation on inter district excessing as opposed to intra-district excessing would be a more limited and discreet burden and application on the City school system while at the same time it would serve the exemplary purpose of minimizing any burden on the plaintiffs' class by excessing this fall.

Still another consideration perhaps to keep in mind is something that, to the pain of counsel for the Board of Education, counsel for the 23 school districts represented by Mr. Rebell here has made, and that is that it would probably be much less burdensome and expensive in the long run, if not the short, if this Court were to sign a limited order akin to proposed order No. II rather than sign no order at all only to find after September 1st that there was some sort of an impact on persons who are members of the class represented by plaintiffs in such excessing as the Board chooses to do.

Trying to put together all of these facts, projections, circumstances and considerations just summarized I confess that, as usual in this difficult case, there is something to be said for both points of view.

Nevertheless, I am prepared to opt for a proposal such as Ms. Silver's order No. II, with the emphasis,

however, that the City in September will have opportunity to show us the facts as to just what happened and as a result obtain relief from this order if need be.

I might say in passing that I am reluctant at this point to sign any orders such as proposed order No. I which projects a complete restriction on excessing for some three years into the future. It may well be that we will come to that point, depending on the facts, but I doubt it.

MS. SILVER: Your Honor, if I might interrupt, I do feel it necessary to point out that it was our intention at least only, by order No. I, to prevent excessing of acting personnel.

THE COURT: No, that is true, and I haven't said as much and I accept that interruption and I think you for it. But nevertheless, I regard it still as a more sweeping order than No. II, and I'm sure you would agree on that.

MS. SILVER: Yes.

THE COURT: So what I am going to do is, with a few minor modifications, sign proposed order No. II. However, to the extent the language in that order does not emphasize it perhaps sufficiently, paragraph No. 4 should be construed to indicate that the City has every right to insist at a hearing in September that the orders be

rescinded and such further orders as might be necessary be then entered to assist in whatever seems proper. Surely the plaintiffs have the same rights, depending on the information.

Now, the changes I am making are as follows:

On page three of the proposed orders I think the City should have two weeks, not just one week, to furnish this information to the school boards. After all, it is only July 30th. And if the decisions are not going to be made until August 30th or thereabouts, two weeks ought to be sufficient.

Second of all, I have some question if the City will really have ample time, given all the burdens that fall on the Board of Education in early September, to do this by September 13th.

How would you feel about that, Mr. Gopstein?

MR. GOPSTEIN: As far as providing the necessary information?

THE COURT: September 13th. Would you like a different date than that?

MR. GOPSTEIN: I am just trying to find the paragra your Honor.

THE COURT: It is paragraph 4 on page 4.

MR. GOPSTEIN: I would rather, your Honor,

that we stay probably with the earliest possible date and, if it becomes impossible, that we then notify the Court.

THE COURT: All right. Then would you like another date? It will be pretty impossible for me to do it any earlier than the 9th, but if you would like it earlier that week, either the 9th, 10th or 11th --

MR. GOPSTEIN: I don't have before me the actual date of the opening of school, which might be relevant to getting some of this information before the Court.

THE COURT: I believe the opening of school is September 3rd, is it not?

MR. GREENWALD: No. We are talking about the students reporting, which is really a critical element. I think we are talking about the 9th of September.

THE COURT: Oh, it is not until the 9th.

MR. GREENWALD: Supervisors and teachers report earlier.

THE COURT: You are quite right. I was thinking of the students. So it is not until the 9th. That helps a little.

MR. GREENWALD: That's what I understand.

THE COURT: So then maybe we had better stick to the 13th.

MR. GREENWALD: I think we straightened out the 9th

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as the date last night.

MR. GOPSTEIN: Your Honor, maybe I didn't understand. But will the Court be available on the 13th?

THE COURT: Yes. I was just giving you the option, if you wanted to.

MR. GOPSTEIN: I would suggest perhaps we stay with the 13th.

THE COURT: All right.

MR. GOPSTEIN: And since I think we are all sensitive to the fact that we are going to try to get these figures as soon as possible before the Court, I think that if ineed they are clear and show the kind of results which I believe they will show, that we could always come back to the Court and ask for a change.

THE COURT: That's all right. I agree with that.

So I will sign it as is. That hearing will be at 3:15 that day. That is a Friday.

What I have done, Ms. Silver, I have signed this Xerox copy.

MS. SILVER: And I am going to file it tomorrow myself. But I am going to leave this with you -- there is just the very little change on page 3, because I want the Board to have two weeks rather than one. They must be going crazy with paper work at this time of year.

So it might help them a little.

MR. GOPSTEIN: Your Honor, was there any additional language in paragraph 4 along the lines you suggested?

THE COURT: No. I don't think it is really necessary so long as I state on the record that paragraph 4 shouldn't be just read narrowly to mean the plaintiffs can get any orders they want; it should mean the Board of Education as well, including a total rescission of any injunction against even inter-district excessing. You see?

MR. GOPSTEIN: Thank you, your Honor.

MR. GREENWALD: Your Honor, may I ask if on page 3, paragraph 3, 3-A, where it says, "A copy of this order accompanied by an explanation agreed upon by the parties," that the parties as defined include the intervenor.

THE COURT: You want some input.

MR. GREENWALD: Yes, your Honor.

THE COURT: I wouldn't object to that. That is page 3, paragraph 3-A, "The parties hereto" -- and he wants to know if he can have his say with you people.

MR. REBELL: Your Honor, may I ask for similar consideration, especially since this is going to the community boards, most of whom I represent?

THE COURT: Yes, you may. I am not going to change the order. But you have purported to represent

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your clients as a friend of the Court. I will continue assuming you will be no more nor less than that.

MR. REBELL: Okay. One more possible clarification, your Honor. On page 2, paragraph B, third line from the bottom, where it says, "To fill vacancies," for the sake of clarification might I ask that the word "supervisory" be added so that it will read, "To fill supervisory vacancies," just so there is no question about this covering any other vacancies?

THE COURT: I assume you agree, Ms. Silver?

MS. SILVER: Yes, sir. We are somewhat concerned, your Honor, about that implementation of this agreement upon an explanation. I mean the problem is, if the Board has two weeks to prepare this and it has to convene with all these different people who have to agree upon it, in truth --

THE COURT: Wait a minute. No. All I am suggestin is that these two gentlemen shall have a right to speak to you and to counsel for the Board about any explanation you draft.

MS, SILVER: In advance of it being sent out to the school boards,which will put the burden,I am afraid, on the Board of Education to see that we get it in time to make our copies.

THE COURT: I should hope that you would be the

first to agree. You ought to get right at it. Right?

MS, SILVER: Yes.

THE COURT: All right.

Let me leave this with you and Miss Patterson and then you give it back to her and I'll staple it and we will file it tomorrow.

All right?

MS. SILVER: Thank you.

Order of Tyler, J. dated July 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs and defendant Board of Education having appeared before this Court on July 25, 1974 to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules; ~~and the parties, after consultation, having agreed that pending the submission to the Court of further information on the potential impact of inter-district seniority excessing on acting personnel, such personnel should be protected against any involuntary inter-district excessing~~:

IT IS HEREBY ORDERED:

I. Commencing with the date of this Order, and pending a hearing and further Order of the Court following the furnishing by defendant of information specified in paragraph II below,

A. Defendant Board of Education, its agents and employees and all other agencies or persons acting in concert with

Order of Tyler, J. dated July 30, 1974

said Board or subject to its authority, including but not limited to all community school boards of the city school district of the City of New York and the Chancellor thereof, are stayed and enjoined from any inter-district excessing of supervisory personnel. As used herein, the term "inter-district excessing" includes any shift or transfer of an individual from one position to another, whether or not entailing a demotion or lay-off, made because of the abolition of an identical or higher position, which entails such individual's involuntary removal from the jurisdiction of the appointing authority (i.e., community school board or City Board of Education), under which he is serving at the time the excessing occurs and/or involuntary assignment or appointment to a position under the jurisdiction of another appointing authority. The inter-district excessing prohibited hereby shall not include any such shift or transfer arranged by mutual consent of an affected individual and relevant appointing authorities.

B. Defendant Board of Education, its agents and employees, and all other agencies or persons acting in concert with said Board or subject to its authority, including but not limited to all community school boards of the city school district of the City of New York and the Chancellor thereof, are further stayed and enjoined during the pendency hereof,

Order of Tyler, J. dated July 30, 1974

from taking any measures (including the giving of public notice pursuant to Paragraph III.A.2 of Special Circular 30, 1972-73) to fill supervisory vacancies which have not been publicly announced pursuant to Paragraph III.A.2 of Special Circular 30, 1972-73 prior to the date of this Order.

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II. No later than September 6, 1974, defendant Board of Education shall furnish to the Court, the parties, intervenor CSA and amicus herein, the following information:

A. A list of each supervisory position which has been or will be temporarily or permanently abolished, cut or otherwise declared in excess by any appointing authority for the school term commencing September 1974, setting forth with respect to each, the title, license, school, and appointing authority.

B. The name of each supervisor, if any, who would be subject to inter-district excessing as defined in Paragraph I.A. supra, pursuant to defendant's proposed excessing rules, except for the stay imposed by this Order, with the position from which such person would be excessed (described in the manner set forth in Paragraph II.A, above), the position to which he would be excessed if any (also described in terms set forth in Paragraph II.A above) and the race, ethnicity (black, Puerto Rican, white) of such person.

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Order of Tyler, J. dated July 30, 1974

III. In order to assure the members of plaintiffs' class and other acting personnel assigned pursuant to this Court's orders the benefits of any application of the defendant Board's proposed seniority excessing rules allowed pursuant to this Order, or of any such rules which may be allowed by further Orders of this Court, the said defendant shall within two weeks hereof furnish to all community school boards

A. A copy of this Order accompanied by an explanation agreed upon by the parties hereto and

B. A statement of any steps which appointing authorities should take to assure that, all individuals eligible for coverage by the excessing rules shall in fact be covered. Such statement, shall include, but not necessarily be limited to an explanation of any steps necessary to assure that acting personnel who have obtained licenses pursuant to the Interim licensing procedures initiated in accordance with this Court's orders are "appointed" in time to be covered by such rules for purposes of any excessing in the September 1974 school term.

IV. All parties shall appear before this Court on September 13, 1974 at 3:15 p.m. to consider what further orders, if any, should be made in regard to the matters set forth herein.

Dated: New York, New York
July 30, 1974

H.R. Tyler, Jr.
U.S.D.J.

Affidavit of Frank C. Arricale dated July 30, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF KINGS)

FRANK C. ARRICALE, being duly sworn, deposes and says:

1. I am Executive Director of the Division of Personnel of the Board of Education of the City School District of New York.

2. This affidavit is submitted to present to the Court information relevant to the proposed excessing and seniority regulations presently under consideration.

3. Two major factual points on the operation and effect of "excessing" rules must be emphasized:

(a) "excessing" of personnel to meet budget limitations is not in any way synonymous with "lay off" of personnel. No supervisor has lost a supervisory position because of excessing in at least the last five years and, on information and belief, this has been true for the past 30 to 40 years.

(b) It is presently anticipated that approximately 25 supervisors will be excessed in the coming semester in the entire city school district.

Under the operation of seniority and excessing rules, all would be assured of other supervisory positions in the city school district since many times that number of vacancies occur regularly as a result of retirements and resignations.

4. In their memorandum submitted July 25, 1974, plaintiffs repeatedly refer to the excessing and seniority rules as "lay off" rules and cite the intervening CSA as predicting that the number of such "cuts" will range from 150 to 300 (plaintiffs' memorandum, page 4). They then conclude that "it is virtually a foregone conclusion that only 'actings' and within that group, primarily minorities will be laid off." (plaintiffs' memorandum, page 5).

5. The actual information presently available indicates that approximately 25 supervisors will be excessed in 1974-1975. This number is subject to some upward or downward revisions as more final figures from community school districts are received. More definitive figures should be forthcoming from community school districts by August 12 when most districts should know what their organization will be like for the coming year. Final excessing figures must be registered with the Division of Personnel by August 30.

6. While the present projection of 25 may vary upward or downward by about 10 positions when final figures

Affidavit of Frank C. Arricale dated July 30, 1974

are available, it is based on reliable information that is already available from many discussions with the community school/districts. Moreover, it is consistent with the number of supervisors excessed in the past three years under decentralization. Eleven, 34, and 12 supervisors have been excassed on an inter-district basis in the past three years, respectively.

7. The following chart indicates the numbers and dispositions of such excessing:

School Year	Excessed Superv.	Disposition
1971-1972	12	9 were placed in license in other districts or in centralized programs; 3 were placed in central headquarters offices.
1972-1973	34	25 were placed in license in other districts; 3 were placed in centralized programs; 5 were returned to their original districts because of the availability of positions due to new funds; 1 was assigned to central office.
1973-1974	11	8 were placed in license in other districts or centralized programs; 1 was placed in a higher position by the very district from which the person was excessed; 1 was placed in a central office assignment; 1 is awaiting assignment.

Affidavit of Frank C. Arricale dated July 30, 1974

8. As the above information indicates, all excessed supervisors were placed in other positions. Not a single supervisor was "laid off" as a result of the excessing rules.

9. The same will undoubtedly be true for any supervisor who would be excessed in the coming school year.

10. The reason for this is apparent in examining the number of vacancies created annually by supervisor retirements:

1971-1972 : 262 supervisor retirements
1972-1973 : 489
1973-1974 : 209

The projected number of retirements from supervisory positions for the coming school year is expected to be between 200 and 215. As with the number of excesses, more definitive figures will be available by August 12 and August 30 but it should be noted that the estimate of 200 to 215 is presented as a conservative projection.

11. Because the number of supervisory retirements far exceeds the number of supervisors excessed, not only are no excessed supervisors "laid off", but their placement in other, available supervisory positions almost never causes a "bumping" process among other supervisors since the excessed supervisor is normally assigned to an existing supervisory vacancy rather than to a position presently occupied by another supervisor.

Affidavit of Frank C. Arricale dated July 30, 1974

12. Inherent in the operation of the excessing rules is the obligation of the central Division of Personnel to find an opening for the supervisor excessed and an obligation of the district with a vacancy to appoint such an excessed supervisor before it may appoint a new supervisor.

13. An indirect but important result of such a system is to prevent, at least in part, a racial and ethnic polarization in the composition of the supervisory staffs of the various community school districts.

14. Because a school board has no option as whom to excess or whom to appoint when an excessing situation arises, its excessed or appointed personnel are determined without consideration of the racial or ethnic identity of the supervisor.

15. Thus, a community school board with a majority from one ethnic group might be prevented from excessing only individuals from another ethnic group. In those districts with a predominantly minority or mixed school enrollment but a white majority school board -- a not uncommon situation in the school system--excessing rules ensure against the possible exercise of a "discretion" which might result in the excessing of supervisors of only a particular ethnic group.

16. Conversely, districts which have rising enrollments or which for other reasons have supervisory vacancies available are required, by the excessing rules, to first

fill such vacancies with available excessed personnel from other districts before exercising their discretion on new appointments.

17. Attached hereto as Exhibit "A" is a two page memorandum, concerning some of the information set forth above as well as additional relevant information.

/s/
FRANK C. ARRICALE

Sworn to before me on
July 30, 1974

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Exhibit A—Memorandum

July 29, 1974

STATISTICS ON EXCESSI PERVISORS RELEVANT TO THE CHANCE/MERCADO CASE

Prior to decentralization of budgets in 1971 the figures on excessed supervisors are unavailable.

Figures on intra-district excessing are not available inasmuch as the districts place their own personnel and do not require the central Division of Personnel to intervene.

School Year	Excessed Superv.	Disposition
1971-1972	12	9 were placed in license in other districts or in centralized programs; 3 were placed in central headquarters offices.
1972-1973	34	25 were placed in license in other districts; 3 were placed in centralized programs; 5 were returned to their original districts because of the availability of positions due to new funds; 1 was assigned to central office.
1973-1974	11	8 were placed in license in other districts or centralized programs; 1 was placed in a higher position by the very district from which the person was excessed; 1 was placed in a central office assignment; 1 is awaiting assignment.

1974-1975 Projection of 25 excesses. It must be noted that the districts are now working on their budgets so that the 25 figure is a rough projection. By August 15th most districts should know what their organization will be like for the coming year. In any event, the Division of Personnel has always mandated that any excessing for the coming year by a district or a central office program must be registered with the Division of Personnel by August 30th. If this registration of the excessing is not in the Division of Personnel by August 30th then no excessing is allowed for that coming school year.

Supervisor Retirements

1971-1972 - 262 1972-1973 - 489 1973-1974 - 209

The projected number of retirements from supervisor positions for the coming school year are expected to be between 200 and 215.

Exhibit "A"

Exhibit A—Memorandum

Districts gaining pupils

The following districts from past experience will be having an increase in enrollment:

6, which covers upper Manhattan, Washington Heights, Inwood;
10, which covers northwest Bronx, including Riverdale;
17, which covers Flatbush and Crown Heights;
24, which covers Corona, Middle Village, Maspeth, and Ridgewood;
31, which covers all of Staten Island

New schools opening in the Fall

High School Division - 2

North Central in Brooklyn, and Martin Luther King, Jr., in Manhattan

Districts

7 - 1)		13 - 1)		24 - 1)		31 - 2 Richmond
9 - 2)	Bronx	19 - 2)	Brooklyn	25 - 1)	Queens	
10 - 1)		21 - 1)		28 - 1)		
12 - 2)		32 - 2)		29 - 1)		

The majority of the remaining districts will be losing pupils or at very best maintaining almost their same pupil register.

RECEIVED 1974 FRANKLE & GREENWALD

Transcript of Proceedings dated September 13, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

70 Civ. 4141

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

September 13, 1974
3:30 p.m.

BEFORE :

HON HARD R. TYLER, JR.,

District Judge

APPEARANCES:

ELIZABETH B. DuBOIS, ESQ.
Attorney for Plaintiff

ADRIAN P. BURKE, ESQ.
Corporation Counsel, City of New York
Attorney for Defendant Board of Education
BY: LEONARD BERNIKOW, ESQ.
MARIE DE CANIO, ESQ., of Counsel

Messrs. KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant Board of Examiners
BY: HOWARD A. JACOBSON, ESQ., of Counsel

(Appearances continued on page 2.)

APPEARANCES (Continued)

Messrs. FRANKLE & GREENWALD,
Attorneys for Council of Supervisors and
Administrators
BY: LEONARD GREENWALD, ESQ.,
of Counsel

MICHAEL A. REBELL, ESQ.
Attorney for New York City School Boards Association
Amicus Curaie

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THE COURT: Initially, I must confess to considerable confusion as to what your intentions are today. I received some information yesterday indicating that some of you may want to adjourn this, particularly in light of receipt, as I think you all received a copy of a letter of Mr. Bernikow, which was dated September 5, to which there was an attachment of some significance pursuant to an earlier order of the Court in July.

So I would like to know, first of all, what are we doing today? Are we adjourning this matter or what are we doing?

MS. DU BOIS: I don't think so, your Honor. The confusion was really just I had heard from Mr. Jacobson that there was no hearing and I understood from you that there was, and I didn't get served with the material until last Wednesday, so I had some confusion as to exactly what it

meant, which has been cleared up just now by Mr. Bernikow's colleague.

So we are ready to proceed, unless anyone else wants to delay. I haven't had time to submit anything, but I don't think it's necessary.

THE COURT: All right.

Who wishes to be heard?

MR. BERNIKOW: Your Honor, perhaps you'd like some explanation of the document which I submitted last Friday.

THE COURT: You astutely have forecast one thing, and that's correct. I would like an explanation.

MR. BERNIKOW: All right.

I am referring to the summary which was submitted to this Court last Friday and a copy to all parties. I must say I caused to be sent to Miss DuBois, a copy on Friday, but apparently she didn't get it. All the other parties have it. Apparently an overnight or I don't know what happened

THE COURT: Mine came in this morning.

MR. BERNIKOW: I think the first column on the summary entitled "Total Number of Positions Abolished", I think is self-explanatory. Those are the positions which have been abolished in the local school boards and the Board of Education. They are just positions and not necessarily

people.

If your Honor has any questions on that I'd be happy --

THE COURT: No, I think I follow you on that.

MR. BERNIKOW: All right. The second column, your Honor, applies to all the people in the school system that have been appointed. That is certainly the people who have been appointed prior to the beginning of this lawsuit and those people that have also been appointed after the on-the-job evaluation, which was just completed a few months ago.

In other words, the person who received his license in August and was subsequently appointed in August, he is part of this column 2.

THE COURT: All right.

MR. BERNIKOW: Now, the third column and the fourth column I guess would lead you to some problems.

Getting to the third column that applies to those people who were licensed in August but for some reason or other the community school board has not appointed them as yet; and probably don't have any positions for them.

THE COURT: All right. They are without positions at the present time.

MR. BERNIKOW: Right.

THE COURT: And unlikely to get one for this school term.

MR. BERNIKOW: In that particular district.

THE COURT Right.

MR. BERNIKOW: The right column, your Honor, applies to those people who have not been licensed, they have not qualified, either they have failed the on-the-job evaluation or they did not meet the requirements or they have not been acting for a five-month period.

I believe not acting for a five-month period is the largest group of this number.

THE COURT: May I ask what may be a naive question. They have not been active, what do you mean by that?

MR. BERNIKOW: In other words, they have not been in an acting position for five months.

THE COURT: In other words they have not been working in the summer at all?

MR. BERNIKOW: They may have been working in other positions, but they have not been an acting supervisor --

THE COURT: Right. They have not been acting or working in a supervisory position?

MR. BERNIKOW: Right. Just to refresh your recollection, in Judge Meonfeld's July 12, 1973 order, it provided that before a person was eligible to take the on-the-job

evaluation he must be acting in a position for five months and one day.

THE COURT: I understand that. But when you said acting, I was a little bit thrown off by that term. But you have explained it.

MR. BERNIKOW: And the last column, column number 5, your Honor, those apply to vacancies within the City.

THE COURT: Right.

MR. BERNIKOW: Would your Honor have any specific questions.

THE COURT: No, I think I am clear so far.

MR. BERNIKOW: That will be all I will say at this time.

THE COURT: All right.

MR. DU BOIS: If your Honor wishes, I'd be prepared to address myself to what plaintiffs feel to be the significance of these figures.

THE COURT: Yes. But before I do that, I wanted to ask Mr. Rebell, I received just now from you apparently, or at least from your office, a memorandum.

I haven't had a chance to read it because it just came in, but to what issue or question does that address itself?

MR. REBELL: Your Honor, I apologize for the

lateness. I guess I managed to get the thing finished and merely served it on the parties. But this memorandum is addressed to analysis of the data presented by defendants and our conclusions as to the import of these figures for the issuesthat I believe are still pend on this excessing question.

THE COURT: When you say the data, you are not limiting yourself to what we received under cover of Mr. Bernikow's letter of September 5 --

MR. REBELL: We are limiting ourselves to those figures, yes. I'm not presenting any new information, I am analyzing those figures and the significance of them from our point of view.

THE COURT: You are analyzing the summary we received?

MR. REBELL: Yes.

THE COURT: Mrs. DuBois, you wanted to say what the plaintiffs' view was on this?

MRS. DU BOIS: Yes, your Honor.

We feel that the information confirms plaintiffs' predictions to the impact both on the plaintiffs' class and particularly on minority members of that class, and the defendants' assumptions that the defendants stated previously, assumptions as to both the minimal number of persons that

they believe would be affected by excessing, which I believe they estimated to be 25 and also their assumption that there would be no terminations, which was Arricale's statements in some of his affidavits. In fact, it is clear that insif-nificant numbers of persons will be excessed and terminated if the Board of Education's proposed excessing rules are allowed to go forward and it's also clear that a gross disproportionate percentage of these persons are minority as compared to minority persons in the system as a whole.

The totals, your Honor, which don't appear on this cover sheet but which we have totalled, there are 63 peopl who would be excessed and/or terminated, and that is totalling up columns 2, 3 and 4, your Honor. It is a total o. 63 persons. Seventeen or 18, there is one uncertain person in their calculation, of those people, are minority, besides a percentage of 27 per cent of that total would be minority persons.

THE COURT: I'm sorry. Let me get that straight. You say a total of 63 persons --

MR. DU BOIS: Are to be excessed or terminated, which is columns 2, 3, and 4. 17 or 18 of those persons would be minority, which is 27 per cent. If we take just the terminated categories, there are 28 people who will be absolutely terminated without jobs in the system and out of

those 28, 42.9 per cent are minority, or almost half would be minority. I might note that the previous figures which are in the record previously in this case, indicate that in the system as a whole, the regularly licensed supervisory personnel, we have figures that, as I said, are in the record previously, that approximately 1 per cent of the regularly licensed principals were minority, approximately 7 per cent of the regularly licensed assistant principals. So that you can see there is a gross discrepancy between the kinds of figures here as to minority to be excessed as is compared to the system as a whole.

We felt that this is, or would be, an intolerable situation. I'd like to remind the Court that previously when we pointed out what we felt would be the impact of the union's rigid existing rules, it seems to be the Court noted that impact and really invited the Board of Education to come in with excessing regulations which would try to take care of the problem, and the Board of Education came in with proposed excessing regulations which as plaintiffs pointed out, simply exacerbated the problem. I think that the Court once again invited the Board of Education to try to come up with at least some solution, and I'd just like to point out that once again the Board of Education has come up with no solution.

We have simply their proposed regulations which have this impact. In light of that, your Honor, I would strongly urge that the Court issue the order which we previously submitted to you. You will remember that we submitted previously two alternative orders the last time that we were before you on this matter. You issued the second, which was a temporary stay so that we could get this information. I'd like to now urge that the first alternative order be issued. That order provided for an injunction against the excessing of all persons who had been assigned, appointed or licensed since the entry of the September 20, 1971 preliminary injunction.

It provided -- we suggested this order, your Honor, as a compromise from what our rigid position was. We ask in this order simply for relief which is comparable to that in the case we cited to you, the Elvira case from the Second Circuit which simply prohibited excessing of the people who gained positions pursuant to this Court's order for a limited period of time, through October 31, 1977, a period of three years.

This would allow the regular senioritysystem or whatever excessing system the Board of Education is proposing, to continue in effect for that three years for everyon else in the system and would not, we feel, be anything

revolutionary that the Court would be imposing on the system as a whole. Then at the end of that three years the system could go into effect for everybody in the system.

THE COURT: Yes, I rather thought that would be your position, and I understand it. However, what puzzled me was, and still puzzles me, it may only be a natural result of the dog days of August and the fact that many of you were quite understandably taking vacations, which I am sure you richly deserve and probably deserved more than you were able to take. But I don't think that the City, when I am saying the City, I am saying the defendants, have really ever had a chance to, perhaps, or whether they had a chance or not, have really responded to your arguments.

True, we temporarily stayed everything pending receipt of this information which we now have. You have assessed it very succinctly.

I haven't heard anything from the defendants, and shouldn't I give the defendants a chance to show case as to why your second order shouldn't now be entered?

MRS. DU BOIS: That sounds reasonable.

THE COURT: I don't want to prolong this because to do so would be prejudicial perhaps to all parties, at least some of them, most notably I would say the plaintiffs' case. Do you see what I am trying to drive at, Mr. Bernikow?

MR. BERNIKOW: Yes, your Honor.

MR. DU BOIS: I assumed that's time for them to present an argument, but are you suggesting more time?

THE COURT: Nobody submitted any papers except Mr. Rebell, so I really came in here flying blind, so to speak. I guess he had what you were going to see, say the figures, I guessed roughly. But I haven't heard anything from the defendants.

MRS. DU BOIS: I assume that they feel they ought to have a chance to say what they have to day to day. I believe they have been given more than ample warning and opportunity to come up with a position.

THE COURT: You may be right. But what I am saying, Mr. Bernikow, what about it? I mean, we know what the plaintiffs wanted, before today.

MR. BERNIKOW: Mr. Arricale's prognostication of 25, I think, is quite accurate because the actual number would be 26, if you look at column 1.

Because the last two columns are people that have not been appointed. We have also maintained that people who have not been appointed should not be considered for the purpose of seniority and excessing purposes. If you look at column 2, rather, you will see that there are 26 people there. Mr. Arricale, I think predicted 25.

THE COURT: All right.

MR. BERNIKOW: Second, your Honor, this is not to say that these people are going to be laid off or terminated. We can find vacancies for these people throughout the system. And we maintain that we should find positions for these people only if they have rights. I maintain that is, the defendants maintain that the people in columns 3 and 4 don't have any rights at this time. As soon as they get appointed, at that time they will have rights, and we will find jobs for them.

So I don't think the picture is as bleak as Mrs. DuBois points out. I can, if I may, submit an affidavit to this effect, something to this effect, perhaps next Tuesday, to clarify our position further.

THE COURT: I think, frankly, because of the hiatus which is natural, I really would like to -- I am perfectly frank to say that these excessing issues, not just in this case, but in a whole host of cases that you all know and I know are pending in this and other Federal Courts now, I think this is one of the most troublesome issues. I yield to no one in my experience in civil rights matters before I came on the bench, and I encountered it then. I tell you right now, I think it is a devilish problem. I am by no means satisfied that the courts have coped with it at all

adequately. I am by no means satisfied that justice can truly be done in any of these matters. We know we are facing a declining school population, we know we are facing a decline in revenue . Every municipality and local government entity in the country is facing a crisis in that regard. New York City's are only bigger and worse than most and worse of all, what bothers me about excessing in an effort to eradicate discrimination, we might end up penalizing people who have nothing to do with perpetuating or inducing the discrimination.

It's just an agonizing problem. I am inclined to think that at the very lease that means that I would like the benefit of your thoughts on paper. I am not accusing you of being delinquent. That's not my point at all. You have been under considerable pressure for a variety of reasons. I have already observed I knew you were going on vacation and you should have gone on vacation, probably earlier than you did. But I see no reason why I can't have your views in writing next week.

Mr. Rebell, you have given me your views.

MR. REBELL: Yes, your Honor, I'd like to speak on that.

THE COURT: Fine. Mrs. DuBois, perhaps the defendants will be somewhat hampered by the religious holidays next

week.

MR. BERNIKOW: I spoke too quickly, yes, your Honor.

THE COURT: Believe me, I am alert to that problem. I have been hearing it all week.

MRS. DU BOIS: As long as the present stay is in effect --

THE COURT: Yes, I'm not going to lift the present stay.

MRS. DU BOIS: We are not concerned with the delay, if that's what concerned you.

MR. BERNIKOW: May we have until Thursday to submit the papers?

THE COURT: Certainly. Some of you people have that problem and you may have the same problem. Fine, now, Mrs. DuBois, I would think unless you disagree, I'd like to have you respond succinctly.

I don't want anything elaborate. You have made your position clear. I do think that you ought to respond to what Mr. Bernikow said.

MRS. DU BOIS: I'd like to do, and also have a chance to respond to what he is submitting on the 19th, if possible.

THE COURT: Let's see the color of what you have

both produced. You both have full freedom to call me. Over here on the left is the gentleman who is supplanting Miss Patterson as the secretary pro tem. in chambers.

Mr. David Patterson. You won't catch me because I am on one of those marathon criminal trials that we are so good at putting on here, so I will be tied up in that most every day.

You call him if you feel like putting in replies, but I don't think you should plan on that now. You have all worked terribly hard and for that reason I don't want to impose on you anything more than what the traffic will bear. But I do think that what Mr. Bernikow is suggesting deserves an answer. I see your analysis, but I at least see some surface plausibility in what he is saying, because I believe it is self-evidence that the City can still place some people around, it may not be their favorite job, but look at the vacancy column. That suggestion on its face that there is room for maneuver here, and that excessing is not quite as extreme in its application as one might think just by the use of that terrible word.

MRS. DUBOIS: What I was hoping was that, I have to be out of town on business both Monday and Tuesday next week, if I couldhave a chance to answer not his oral presentation but what I assume what was submitted Thursday will

be a sort of supplement to what they have already submitted. If I could have a chance to submit one document that would follow Thursday by some period of time like maybe the early part of the next week, I'd rather do that than submit it simultaneously.

THE COURT: No, I don't see the need of that. If you want more time I am sympathetic. But basically you see what the City's position is. You have succinctly stated yourself.

MS. DU BOIS: All right, your Honor.

THE COURT: If you want until Friday or the following Monday, I am perfectly sympathetic.

MS. DU BOIS: I'd be happier to have it Friday or the following Monday.

THE COURT: I am sure Mr. Bernikow would join in that.

MS. DU BOIS: Friday?

THE COURT: Perfectly fine. A week from today. That is September 20. You want to add anything now, Mr. Rebell?

MR. REBELL: Yes, sir. Just two quick points in response to Mr.Bernikow's oral summary, or really one, that necessitates any comment.

As pointed out in our brief, the fact that there

are a large number of vacancies in the last column here does not mean that all the people in the three previous columns could find jobs, because if you would look closely, your Honor, you will see that most job categories do not add up, and that means that under the defendants' proposed excessing rules these people would have no right to the job, they would have to apply as total strangers.

I don't think the issue is as simple as he states. As we state in the opinion, between 10 and 25 people would have to be laid off.

I would like to make a request that while the basic injunction is continued, in effect one aspect of it be lifted, and I don't know whether the defendants would have any objection to this, or the plaintiffs.

But I am referring to the apsect of the current order which prohibits the advertising of new Circular 30 vacancies. I think that it is unnecessary at this point to continue the administrative complications for the Community Boards that is raised by this because the simple reality is that the actual appointment of a person after all those procedures are completed takes a minimum of four and an average of something like six months, which means even if we are going to eventually fill those positions --

THE COURT: Yes, that is a point worth addressing. You see what he means? Give the bureaucratic requirements, offhand I think this makes a certain amount of sense.

MR. BERNIKOW: The only thing, I don't want to have any more people appointed when we don't have this excessing thing done. It only means more people appointed.

THE COURT: What Mr.Rebell is suggesting, part of the temporary stay, the boards were restricted from sending out these circular advertising existing positions. He is suggesting that that in itself causes more problems than if we were to continue the total stay.

I am not sufficiently an expert in such bureacracies if it appears to me that he has a plausible point.

MS. DU BOIS: Mr. Arricale is the person who first suggested that we do this, I believe, and I thought the problem was that we really don't know what vacancies will exist and ought to be advertised for until this matter is resolved.

THE COURT: That may be so, too.

MS. DU BOIS: And it would be better to put it all off.

THE COURT: I have to lean on you. I am not a student of all the bureaucracies and red tape in the system. That is what I am inviting you to comment on. All I am

saying is superficially they may have a point.

MR. GREENWALD: We would object for the specific reason that we have a point of disagreement with the Board of Education as to w at Mr. -- Mr.Bernikow has taken the position that the third column, licensed unemployed personnel, are not entitled to benefits. We claim they are entitled to benefits. But if the stay on Circular 30 were to be lifted, what would happen if the community boards would have vacancies, and they would be in districts, most probably the districts which are in Queens and Staten Island, the districts in which the minority representation of supervisor is low, would appoint interim acting supervisor, and therefore would effectively close out a possible spot for a minority group or other CSA member to be excessed to. That is the difference. That is exactly why Mr.Rebell's community board want to fill whatever slots they have got as quickly as possible to pr event people from being excessed in who are not the choices of the community board, the local parents association or otherwise.

MR. REBELL: Can I just respond for a moment, please. I don't know if the issue that I have been trying to articulate has actually gotten across to Mr. Greenwald and Miss DuBoi- I am not saying that these positions would be filled and therefore would bar any inter-district

excessing if that is eventually permitted by the Court.

What I am saying is the realities are that nothing can be done in less time than four months anyway. So what we are doing is talking about --

THE COURT: I understand.

MR. REBELL: I don't think Mr.Greenwald does.

MR. GREENWALD: The realities are that an individual is named as interim acting. The community boards go through the process of interviewing and screening and in most cases the interim acting appointed on the first day ends up as the assigned individual.

THE COURT: In other words, you are saying there is no time lag at all.

MR. GREENWALD: No time lag at all.

MR. REBELL: Your Honor, just one detail on that. The interim acting can be appointed under the present order. It is only the advertising for the present that is banned.

MR. GREENWALD: Is Mr.Rebell saying they can't appoint an interim acting?

MR. REBELL: Of course. Somebody has to fill the position.

MR. GREENWALD: But that is subject to advertising when and if it opens. And the interim acting appointed before the Circular 30 advertising won't have any rights to

the position. I think if your Honor --

THE COURT: We are beating George Orwell by quite a few years, namely a decade. This is impossible. How can I resolve this? Nobody agrees on anything factually.

MR. GREENWALD: I think the problem is from our analysis, your Honor, there is no problem of termination for any supervisor, acting or otherwise, in the district, special education or industrial education headquarters. We only have a problem concerning seven assistant principals in high school and we don't view it as a problem of termination, but a problem of semi-commendation and adjustment.

There cannot be any termination under the figures that the Board of Education has given. That is our initial analysis, except in the third group of unlicensed personnel terminated --

THE COURT: Wait a minute. You seem to be getting away from Mr. Rebell's point again. This is very interesting, but as I understand him, he is talking about --

MR. GREENWALD: They can do it. But if the community boards want the circular 30 to be lifted because the person they may want to fill the position may not want to take it on an acting interim basis, he wanted to be protected according to Circular 30, which (1), of course

pays him and (2), gives him protection under collective bargaining. So what we are really doing is filling vacancies ahead of time which may foreclose members of plaintiffs' class as well as members from excessing into our positions.

THE COURT: Do you agree with this, Ms. DuBois?

MS. DUBOIS: Your Honor, I have great difficulty understanding the issue here too. My best guess as to what I think ought to be done in the situation would be to leave it stay as it is and try to resolve the whole matter at once.

THE COURT: I am afraid that I have the same instinct. And yet on the other hand Mr.Rebell could possibly be right, for all I know. But this is such a bizantine operation between the regulations, the State laws, the collective bargaining agreement, the politics -- Mr.Rebell, I am sorry. I am going to let matters stay. If you feel you can establish this, more power to you. But on the present record this Court would be ill-advised to tinker with the present stay.

All right. One week from today. This includes you, Mr.Greenwald, if you want to put in something, I would welcome it. I didn't mean to cut you off.

MR. GREENWALD: I assume you were extending it.

THE COURT: Yes.

MR. BERNIKOW: Before we conclude this, -- I am sorry, I will submit my papers by Thursday and Ms. DuBois by Friday.

Will we have any further hearings on this issue after that?

THE COURT: I am afraid we are going to have to. But I want to see the color of your papers and what you say, and then I think I will have to call you and get at it as quickly as I can.

As I say, I am tied up in a lengthy trial. It has got its problems, and I am not too sure when I can schedule you even if I tried.

MR. BERNIKOW: I would urge, your Honor, that it be as soon as possible.

THE COURT: I agree with you. I understand that completely.

MR. JACOBSON: Your Honor, I am with the Kaye, Scholer firm, which represents the Board of Examiners. I had written a letter to you about a separate issue which I thought would not evoke opposition, and I set forth the status of the 19 unresolved, following the unresolved performance evaluation tests. And the Board of Examiners had requested that the target date for resolving all

of those cases be put off to November 1, basically in fairness to the applicants, to the 13 applicants who must be re-examined because of one or more problems --

THE COURT: I have that. Have you formulated a position on Mr. Jacobson's request, Ms. DuBois?

MS. DUBOIS: Your Honor, our problem is this: I understand the Board of Examiner's explanation, and from the limited amount I have been able to find out it sounds to me reasonable in that the people who have to be really reevaluated does seem it would be most fair to them to give them a chance to be evaluated once the school year has started.

However, my problem is this. Your Honor ordered once before at our request, and on the Board of Examiner's concurrence that there should be no prejudice to this category of persons or to the 3B category, whose licensing has been delayed as a result of the Board of Examiner's delinquency.

There should be no prejudice with respect to any issues that might arise in connection with excessing, etc.

Now, this group of 19 would fit on the Board of Education chart among that group of people who are called unlicensed personnel who would be terminated. So that my concern is that I really would like to see the delay that has been asked for granted.

I simply want to insure that whatever conclusion your Honor comes to on the excessing issue, some accommodation be made so that these 19 people are not prejudiced.

Either what we have asked for should be granted on the excessing issue in which case there would be no problem, or something else be worked out so that they be considered as if they had been appointed, even though they haven't yet been evaluated.

THE COURT: I see the point. I assume your office does too, sir.

MR. JACOBSON: Yes. I just wanted to make a factual point. The status report that I submitted indicated that 13 of the 19 have to be re-examined. Four have already been found to be unsatisfactory as a result of the test, so we are talking about 13 peop'e who possibly might be included in the group.

THE COURT: I understand. It seems to me the answer to this is very simple.

I will grant the extention, but I think we are going to have to understand that we can't do anything in the resolution of the excessing issue which will exclude or ignore these people. I just think we are going to have to tackle that when we come to the excess issue.

MR. JACOBSON: I agree. I think it has been

previously stated that defendants will deem those of the 13 remaining unresolved who passed the other job test to be in the same position as those who passed the other job test previously, and they will have the same rights as of the same date.

MS. DUBOIS: We just have to make sure that they haven't been terminated meanwhile.

MR. JACOBSON: I understand. I think it has been previously indicated on the record that the Board of Examiners has no position on this excessing question.

THE COURT: All right. I think that is sufficient unto the day.

MR. BERNIKOW: Your Honor, I hate to interrupt again, but I have one further point.

The Board of Education would like to get those people in Column 3 into Column 2, so that they willbe protected In other words, they would like to get those people who are licensed and unappointed to be licensed and appointed.

The local school boards have not appointed all those people that they have as acting. I raised this with Mr.Rebell this morning, and he did not have any answer for that. He said he would try to find that out. But I would like to place on him the burden of finding out why many of the local school boards have not appointed people

who have been licensed and are eligible for appointment.

MS. DUBOIS: I thought on that -- let me just take a step backwards, your Honor --

THE COURT. Wait a minute. Before you say anything, look, this seems to me to be a point of information that I would just as soon not be burdened about.

I have other lawyers waiting. This sounds like discovery. I can't add anything to this.

MR. BERNIKOW: We just find a situation, your Honor, where we would like to get these people appointed so they could be protected and it has not been done.

THE COURT: What am I going to do about that today? I don't follow you. I don't know the facts. I am not the local school board. I don't follow you.

What can this Court do about this today?

MS. DU BOIS: I think it comes under your previous order because under your previous order and what the board sent out, I had understood that everybody was supposed to be considered appointed as to whom the Board of Ed had not been notified by August 20th that they were not appointed.

MR. BERNIKOW: I know, but we had gotten back certain notifications that certain people had not been appointed.

THE COURT: Again we are laboring without precise

information, and we can't resolve that with the Judge sitting here who knows nothing about it.

I grant you that the order said about wha-t Ms. DuBois just articulated, but that doesn't answer my problem. An open town meeting about this that are not presented factually to the Court are beyond the Court's power to even think about, let alone resolve.

MR. BERNIKOW: On my submission on Thursday, if we have any facts I will submit that.

THE COURT: You have to, because I can't cope with something that I don't know about.

Thursday and Friday are the dates. It will be my duty to communicate as quickly as possible, because Mr. Bernikow says what we all unde stand and agree with. We can't let the time go more than we need to. The temporary stay, Mr. Rebell, despite your manful efforts to get a slight deviation therefrom, will have to stay put until we decide otherwise.

All right.

(Time noted 4:00 P.M.)

Affidavit of Peter S. O'Brien dated September 19, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:

PETER S. O'BRIEN, being duly sworn, deposes and says:

1. I am President of the Council of Supervisors and Administrators of the City of New York, Local 1, SASOC, AFL-CIO ("CSA") and respectfully submit this affidavit to present to the Court a factual analysis which the Court must have before it in its consideration of any proposed remedy.

2. The CSA initially expressed concern over the magnitude of the excessing for the school year 1974-75. That concern has now been entirely alleviated. As of this date, all schools within the system have been programmed and supervisory and teaching assignments undertaken. Based on these facts and the "summary" information supplied by FRANK C. ARRICALE II, Executive Director, Division of Personnel, I believe the facts justify these conclusions:

(a) that no supervisor (Appointed; Licensed but not appointed; or Unlicensed) will lose his supervisory position.

(b) that few (less than 10) supervisors will be execessed from their districts.

(c) that where interdistrict excessing occurs the results will be beneficial to the system in that it will racially integrate the supervisory staff.

3. The Plaintiffs and Amicus Curiae "Association" have suggested to the Court hopes or political solutions which are not supported by the facts. As attached Chart 1 shows, the total number of supervisory positions excessed -- systemwide -- is 72. The total number of vacancies, systemwide, is 111. We are then left with a surplus of 39 supervisory vacancies. The projected number of retirements, etc., is approximately 200 - 215 for the school year 1974-75. Based on past experience, 85% -90% of these retirements will result in vacancies in school licenses. Thus combining these retirement vacancies with known vacancies will result in approximately 232 vacancies.

4. In addition to these 232 vacancies, there are additional vacancies which are not clearly discernible from the Board's summary. As Chart 1 shows, there are 15 Principal DES vacancies and 2 Principal JHS vacancies. It is a matter of fact that 99%, if not 100%, of all Principal vacancies are filled by Assistant Principals in the

system. Thus, in filling these 17 Principal vacancies, boards will, in fact, be creating 17 new Assistant Principal positions this year for filling by "excessed" supervisors. The total number of black Assistant Principals potentially subject to excessing is 16.

5. In examining the supervisors potentially in excess, Chart 2 shows that, of those affected, 35 are white, 10 black, and 1 Hispanic. By eliminating those who are unlicensed, the total number of minority supervisors potentially affected is 9. The category of "unlicensed" supervisors in the Board's summary consists largely of those who failed the "on the job" examination or supervisors who were assigned as "interim acting" after the examination.

6. In order to support their political hopes, Plaintiffs and Association have suggested racial "trends" which are not supported by fact and amount to little more than racial stereotyping. One such argument is that the minority districts are forced to excess large numbers of minority supervisors. As Chart 3 shows, 18 school districts are not excessing supervisors, but indeed have 30 vacancies in school licenses that must be filled this school year. As Chart 4 shows, only 11 minority school districts are declaring 67 supervisors excess, while reporting 15

vacancies. Community Board 23, with a total "other" enrollment of 0.6, is excessing 10 appointed, licensed Assistant Principals -- all white.

7. Another fact repeatedly espoused by Plaintiffs is that minority districts have suffered enormous decreases in registration, while "other" districts have experienced large increases. The fact is that, as shown by the Arricale figures, almost all the school districts have experienced approximately only 1% - 2% shifts in register since 1971. In fact, as Chart 5 shows, minority districts have gained slightly more in register than "other" districts.

8. The most important fact arrived at from the analysis of the excessing situation is the fact that this Court can, by approving the excessing plan submitted herein by the CSA, achieve, in one act, a meaningful systemwide integration of the supervisory staff. As Chart 6 shows, nine "other" districts have excessed 5 supervisors; 3 school licenses, 2 support licenses. On the other hand, these districts report 15 school license vacancies. With due consideration of the fact that <u>every</u> Principal vacancy when filled will result in an additional Assistant Principal's line opening up, the number of vacancies increases to 23

positions. Moreover, the figures show that some of these districts are "covering" or "hiding" vacancies. For example, District 24 has declared 2 Assistant Principals DES, excessed, while reporting 2 Assistant Principal vacancies. Minority districts are playing a similar numbers game. District 5 is excessing 3 Assistant Principals DES, while reporting vacancies of 3 Assistant Principals DES and 1 Principal DES. The Assistant Principals to be excessed are apparently white. In any event, it is beyond dispute that this Court can significantly integrate the supervisory staff, districtwide, by approving an interdistrict excessing plan. Any "domino" effect would in fact be beneficial, contrary to the claims of the "Association".

9. The proposed excessing plan submitted by the Board of Education is, in my opinion, both contrary to the settlement agreement and Order as well as the spirit of that Order. Under its proposal, the Board would grant excessing rights only to those supervisors regularly licensed and appointed. It would terminate those supervisors who were licensed but not appointed by the appropriate authority. This class would include supervisors who passed the "on the job" examination as well as those who were acting in assigned positions and were on existing lists. Similarly the Board would terminate those who are not licensed, i.e.,

those who failed the exam but are still serving, those assigned since the exam was given, and those who for one reason or another have not yet received the exam results. Included in these groups are 12 blacks and 15 white acting supervisors.

10. Of the 13 licensed and unappointed supervisors, 10 are serving within districts. New community boards were elected in May 1974. It is our belief that the community boards which have withheld appointments have done so for reasons unrelated to the individual supervisor's abilities.

11. For purposes of brevity, I have attached CSA proposed excessing plan as Exhibit 1. It equally protects all supervisors currently serving, without regard to appointment, license, race, or creed.

12. The Court has indicated that it was aware of the trauma that this system, the largest public education system in the free world, has undergone. To destroy the excessing system, as urged by Plaintiffs, a system developed by law and regulation and approved by innumerable

Affidavit of Peter S. O'Brien dated September 19, 1974

state courts, would deal New York City public education a death blow.

Peter S. O'Brien

Sworn to before me this
19th day of September 1974.

LEONARD GREENWALD
NOTARY PUBLIC, State of New York
No. 24-[illegible]3450
Qualified in Kings County
Commission Expires March 30, 1975

Chart 1—Boards with Principal Vacancies

CHART 1

BOARDS WITH PRINCIPAL VACANCIES

DES		JHS	
Board	No. of Vacancies	Board	No. of Vacancies
4	1	21	1
5	1	30	1
9	3	2	2
15	1		
26	2		
28	3		
30	4		
7	15		

Chart 2—Total Number of Supervisory Positions Excess-Boards, Central Board with Ethnic Background of Affected Supervisors

CHART 2

Total No. of Supervisory Positions Excess -- Boards, Central Board	Ethnic Background of Affected Supervisors		
	Regularly Appointed		
	White	Black	Hispanic
Total, 72	30	4	1
Total No. of Supervisory Vacancies Declared by Boards, Central Board	Licensed, Unappointed		
	7	5	0
Total, 111	Unlicensed		
	8	7	0
Total	35	16	1

Chart 3—Boards Not Abolishing Positions

CHART 3

Boards Not Abolishing Positions		Vacancies	
Nos. 6, 7, 9, 10, 12, 13, 14	11	Assistant Principal	DES
17, 18, 19, 20, 22, 25,	6	Assistant Principal	JHS
26, 28, 30, 31, 32	12	Principal	DES
	1	Principal	JHS
Total, 18	Total, 30		

Chart 4—Supervisory Positions Abolished and Vacancies of Predominantly Minority School Boards

CHART 4

Supervisory Positions Abolished by Predominantly Minority School Boards *		Vacancies of Predominantly Minority School Boards*	
Board No.	**No. of Excess**	**Board No.**	**License**
1, 2, 3, 4, 5, 8, 11, 15, 16, 23, 29		3	Assistant Principal DES
		1	Principal DES
Total, 11	Total, 67	9	Assistant Principal JHS
		2	Other licenses
		Total, 15	

*Pupil Registration

Chart 5—Gains in Pupil Registration

CHART 5

Predominantly Minority* Boards Gain in Pupil Registration

Board No.	
9	+ 544
10	+1,241
17	+ 373
29	+ 687
Total,	2,845

Predominantly "Other" (White) Gain in Pupil Registration

Board No.	
24	+ 573
31	+1,864
Total,	2,437

*Pupil Registration

Chart 6—Supervisory Positions Abolished

CHART 6

Supervisory Positions Abolished by Predominantly "Other" (White) Boards* (9)	Vacancies
2 Assistant Principals DES	3 Assistant Principals DES
1 Supervisor Library	4 Assistant Principals JHS
1 Attendance Officer	6 Principals DES
1 Continuing Education	2 Principals JHS
5	15

*Pupil Registration

Exhibit 1—CSA Proposed Excessing Rules for Acting Supervisors

EXHIBIT 1

CSA PROPOSED EXCESSING RULES FOR ACTING SUPERVISORS

These rules pertain to acting supervisors who have served continuously in title for no less than five months from date of assignment by the appropriate authority:

I. Within the school, district, bureau, or other organizational unit the supervisor with the latest date of "appointment" shall be the first to be excessed.

II. An intermediate supervisor who has been excessed from a school in a district to another school in the same district may request an opportunity to return to the school from which he has been excessed if within a year a vacancy should occur in his specific title in that school. Such a request will have priority over any other transfer or appointment to that vacancy.

III. Supervisors in excess in a school, unit, or district office under the jurisdiction of a community board must be placed in vacancies within the district to the fullest degree possible. For schools, units, districts, or bureaus, under the jurisdiction of the Central Board, supervisors in excess in a school or bureau must be placed in appropriate vacancies within the district or central office.

IV. To minimize movement of personnel, excessed supervisors may be assigned when no other vacancies exist within the district to appropriate openings resulting from leaves of absence without pay.

V. The Central Board of Education has the responsibility to place excessed acting supervisors in appropriate vacancies anywhere within the New York City School System.

Exhibit 1—CSA Proposed Excessing Rules for Acting Supervisors

VI. For acting supervisors selected prior to Special Circular No. 42, dated January 17, 1972, the date of appointment, for excessing purposes only, shall be January 16, 1972. Continuous acting service in title immediately prior to January 16, 1972, will be counted for seniority purposes in order to resolve ties.

VII. For acting supervisors selected under Special Circular No. 30 (October 25, 1972), the date of assignment by the appropriate authority will be the date of appointment for excessing purposes only. In cases where the date of appointment is the same, continuous acting service in title just prior to assignment will be counted.

Affidavit of Frank C. Arricale dated September 20, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF KINGS)

FRANK C. ARRICALE, being duly sworn, deposes and says:

1. I am the Executive Director of the Division of Personnel of the Board of Education of the City School District of New York.

2. This affidavit is submitted in support of the Board of Education's proposed excessing rules for supervisors and to supplement my affidavit, sworn to July 30, 1974, heretofore submitted in light of the "summary" which was submitted to this Court on September 6, 1974, copy of which is annexed hereto.

3. Excessing rules and rights are ways of reducing or eliminating the possibility of employees losing their jobs. Excessing rules and rights mean that when a supervisory position has been eliminated because of a reduction in budget, school size, or the closing down of a school, the experienced supervisor becomes the responsibility of the district or of the Central Board of Education to be placed in a comparable vacancy which may exist in the System. Were there no excessing rules or rights, the elimination of a supervisory position would mean, automatically, that the incumbent supervisor would be liable to demotion, lose the supervisory status, and there would be no obligation for any district or central authority to place that supervisor in a supervisory position even though other comparable vacancies existed.

Affidavit of Frank C. Arricale dated September 20, 1974

4. The total number of vacancies now in existence (See last column entitled, Total Number of Vacancies), and with the usual number of vacancies reported to us during the year as is required for advertising purposes, I am confident that the overwhelming majority of excessed supervisors will be given supervisory positions.

5. The Plaintiffs counsel has stated that under the Board of Education's proposed excessing rules, 63 appointed people will be excessed or terminated; such a statement is grossly misleading since "excessed" and "terminated" mean entirely two different things and can not be grouped together. In fact, as I pointed out, excessing is a means of preventing or reducing termination. Excessing is a form of relocation to prevent termination; it is not termination.

6. Under the Board's excessing rules, 35 persons would be in an excessed situation; 26 from the districts and 9 from the central board. If the Court were to mandate licensed personnel be appointed immediately, an additional 13 persons would be in an excessed situation. To be in an excessed situation means to have rights for placement in comparable vacancies existing or about to exist elsewhere in the System. The very excessing rules we seek this Court to uphold would guarantee excessing rights for 48 of the 63 persons the Plaintiffs have mentioned.

7. Under the Board of Education's excessing rules only 15 persons, city-wide and centrally, would be subject to demotion. They would be the 15 total number of unlicensed personnel (See Column 4

entitled, Total Number of Unlicensed Personnel who would be Terminated). The Division of Personnel has urged the community school districts to appoint all of its licensed supervisors who are currently serving in budgeted positions. The Chancellor has set the example by appointing all Central Board supervisory personnel serving in budgeted positions. We have reason to believe that some districts will refuse to appoint or will delay inordinately to appoint all licensed personnel. Consequently, we ask this Court for a remedy for these newly licensed and properly assigned supervisors so that they can achieve immediately all the rights of fully appointed supervisory personnel, especially excessing rights which the Board of Education proposes for appointed personnel and that the "acting" designation be dropped. These personnel have passed the on-the-job evaluation or were on examination lists now no longer enjoined by this Court. Under the original decision of Judge Mansfield there does not seem to be any obligation on the part of the districts to appoint licensed personnel in a timely fashion. Before the Chance-Mercado case only licensed personnel were chosen and their placement automatically meant appointment. Since the Chance-Mercado decision, persons are placed prior to licensure. We ask that upon the granting of licensure, appointment be made either automatically or within a month's period of time. There is no reason not to appoint such licensed personnel properly placed in their positions under regulations approved by this Court.

8. It would be ludicrous under the Plaintiffs proposed plan of

no excessing rules to demote an experienced Assistant Principal in District A while in District B there were advertisements for 5 such positions. The absence of excessing rules and rights would mean the demotion of experienced supervisors when at the very time of their demotion numerous comparable vacancies existed in other schools, in other districts or in the central district.

9. The Plaintiffs lawyers have implied that excessing rules would be discriminatory against Black and Puerto Rican supervisors who constitute a large number of the supervisors placed since the Chance-Mercado decision. It must be kept in mind that although the numbers of Black and Puerto Rican students in the city schools is increasing, the number of Black or Puerto Rican controlled school boards is not. The overwhelming majority of community school boards, even in districts that have a large or even an majority of Black or Puerto Rican pupils are White controlled. Voter turnout on the part of minority groups for school elections is still lower than that of non-minority voters.

10. Because of urban renewal, model cities, and general decay, most Black and Puerto Rican controlled districts are losing, in an absolute sense, students. The expanding student populations are in districts that are White (such as Staten Island) or White controlled (such as District 10, which includes Riverdale). (See attached annual census of elementary and junior high school population by district with a breakdown of racial and ethnic composition.)

Affidavit of Frank C. Arricale dated September 20, 1974

11. The Plaintiffs contention that excessing rules would be harmful to Black or Puerto Rican supervisors is absolutely incorrect; on the contrary, giving supervisors excessing rules will protect the large numbers of new Black and Puerto Rican supervisors from demotion. It will enable us to protect their seniority rights by placing a Black or Puerto Rican supervisor from a dwindling ghetto district to an expanded district in Staten Island, Riverdale or in Canarsie. Excessing rules for Black or Puerto Rican supervisors, as well as for all supervisors in the System, is a protection against racial and ethnic politics that could prevent the placement of : a Black Principal in a white controlled district that had a vacancy or a Puerto Rican Assistant Principal in a Black controlled district that had a comparable vacancy.

FRANK C. ARRICALE

Sworn to before me this
20th day of September, 1974.

NOTARY PUBLIC

ETHEL M. McDONALD
Notary Public, State of New York
No. 41-7817250
Qualified in Queens County
Commission Expires March 30, 1976

"Summary" Annexed to Affidavit of Frank C. Arricale

[PHOTOSTATS]

(Opposite) ☛

SUMMARY

TOTAL NUMBER OF POSITIONS ABOLISHED	TOTAL NUMBER OF REGULARLY APPOINTED IN EXCESS	ETHNIC BACKGROUND	TOTAL NUMBER OF LICENSED UNAPPOINTED PERSONNEL WHO WOULD BE TERMINATED	ETHNIC BACKGROUND	TOTAL NUMBER OF UNLICENSED PERSONNEL WHO WOULD BE TERMINATED	ETHNIC BACKGROUND	TOTAL NUMBER OF VACANCIES
DISTRICTS:							
1 Supv.-Bilingual School & Comm. Rel. 1 Principal DES 48 Asst.Princ. DES 18 Asst.Princ. JHS 1 Supv. of Library 2 Supv. of Continuing Ed. 2 Asst.Princ.JHS(Music) 1 Supv. of Music 1 Asst.Princ.JHS (Eng.) 1 Dist. Supv. Attend. Officer 1 Asst. Princ. JHS (Science) 1 Asst. Princ.District Office.	1 Supv.-Bilingual School & Comm. Rel. 13 Asst. Princ.DES 1 Asst. Princ.DES 2 Supv. of Continuing Ed. 3 Asst. Princ.JHS 3 Asst. Princ.JHS 1 Asst. Princ.JHS (Eng.) 1 Dist. Supv. Attend. Officer 1 Asst. Princ. JHS (Science)	Hispanic White Black White White Black White White White	1 Principal DES 3 Asst.Princ.DES 1 Asst.Princ.DES 1 Asst.Princ.JHS 4 Asst.Princ.DES	White White Uncertain Black Black	2 Asst. Princ. JHS 4 Asst. Princ. JHS 5 Asst. Princ. DES 2 Asst. Princ. DES	White Black White Black	19 Asst.Princ.DES 14 Principal DES 1 Supv. of Guid. 15 Asst.Princ.JHS 2 Principal JHS 1 Supv. of Music
SPECIAL ED. 0	0		0		0		1 Asst.Admin. Director
CENTRAL HEADQUARTERS: 1 Dist. Supv. Attend. Officer 5 Supv. Early Childhood 1 Asst. Princ. DES	1 Dist. Supv. Attend. Officer 5 Supv. Early Childhood 1 Asst. Princ. DES	White White White	0		0		1 Asst.Princ.DHS
HIGH SCHOOLS: 7 Asst. Princ.(Super)	2 Asst. Princ.(Super)	White	3 Asst. Princ. (Super)	White	1 Asst.Princ. (Super) 1 Asst.Princ. (Super)	White Black	1 Principal DHS 8 Asst.Princ.Admin. 11 Asst.Princ.Super.

DISTRICT	SUPERVISORY POSITIONS ABOLISHED	UNDER THE BOARD OF EDUCATION'S EXCESSING RULES: NUMBER SUBJECT TO INTERDISTRICT EXCESSING	ETHNIC BACKGROUND	NUMBER OF ACTING SUPERVISORS SELECTED UNDER SPECIAL CIRCULAR #30 WHO WOULD BE TERMINATED UNDER THE PROPOSED EXCESSING PLAN OF THE BOARD OF EDUCATION: LICENSED UNAPPOINTED	ETHNIC BACKGROUND	UNLICENSED	ETHNIC BACKGROUND	VACANCIES
1	1 Supervisor of Bilingual Comm. Relations 1 Principal-DES 1 Asst.Princ.DES	1 Supervisor-Bilingual Community Relations	Hispanic	1 Princ.DES 1 Asst. Princ.DES	White White	0		0
2	9 Asst.Princ.DES 5 Asst.Princ.JHS	0		0		1 Asst.Princ.JHS 1 Asst.Princ.JHS	Black White	0
3	2 Asst.Princ.DES 1 Asst.Princ.JHS	2 Asst.Princ.DES 1 Asst.Princ.JHS	White Black	0		0		0
4	3 Asst.Princ.DES 1 Supv. of Continuing Ed.	2 Asst.Princ.DES 1 Asst.Princ.DES 1 Supv. of Continuing Ed.	White Black White	0		0		1 Princ.DES 1 Dist.Supv.-Music
5	9 Asst.Princ.JHS 3 Asst.Princ.DES 1 Asst.Princ.-Dist. Office	2 Asst.Princ.JHS 1 Asst.Princ.JHS 1 Asst.Princ.JHS	White Black Black	1 Asst.Princ.DES 1 Asst.Princ.JHS	Uncertain Black	1 Asst.Princ.DES 1 Asst.Princ.JHS 3 Asst.Princ.JHS	White White Black	3 Asst.Princ.DES 1 Princ. DES 1 Supv. of-Guidance
6	0	0		0		0		0
7	0	0		0		0		0
8	3 Asst.Princ.DES 2 Asst.Princ.JHS (Music) 1 Supv. of Music	0		0		0		0
9	0	0		0		0		3 Princ.DES
10	0	0		0		0		0

Summary-2

DISTRICT	SUPERVISORY POSITIONS ABOLISHED	UNDER THE BOARD OF EDUCATION'S EXCESSING RULES: NUMBER SUBJECT TO INTERDISTRICT EXCESSING	ETHNIC BACKGROUND	NUMBER OF ACTING SUPERVISORS SELECTED UNDER SPECIAL CIRCULAR #30 WHO WOULD BE TERMINATED UNDER THE PROPOSED EXCESSING PLAN OF THE BOARD OF EDUCATION: LICENSED UNAPPOINTED	ETHNIC BACKGROUND	UNLICENSED	ETHNIC BACKGROUND	VACANCIES
11	2 Asst.Princ.DES 1 Asst.Princ.JHS 1 Asst.Princ.JHS (English)	1 Asst.Princ.JHS (Eng.)	White	0		0		1 Asst.Princ.DES
12	0	0		0		0		0
13	0	0		0		0		1 Asst.Princ.DES
14	0	0		0		0		0
15	1 Asst.Princ.JHS	0		0		0		1 Princ.DES 1 Asst.Princ.DES
16	10 Asst.Princ. (Elem.)	0		2 Asst.Princ.DES	White Black	1 Asst.Princ.DES 1 Asst.Princ.DES	White Black	9 Asst.Princ.JHS
17	0	0		0		0		0
18	0	0		0		0		0
19	0	0		0		0		2 Asst.Princ.DES
20	0	0		0		0		0
21	1 Dist.Supv. Attend.Officer 1 Supv.of Continuing Ed.	1 Dist.Supv. Attend.Officer 1 Supv.of Continuing Ed.	White White	0		0		1 Princ. JHS
22	0	0		0		0		0

Summary-3

DISTRICT	SUPERVISORY POSITIONS ABOLISHED	UNDER THE BOARD OF EDUCATION'S EXCESSING RULES: NUMBER SUBJECT TO INTERDISTRICT EXCESSING	ETHNIC BACKGROUND	NUMBER OF ACTING SUPERVISORS SELECTED UNDER SPECIAL CIRCULAR #30 WHO WOULD BE TERMINATED UNDER THE PROPOSED EXCESSING PLAN OF THE BOARD OF EDUCATION: LICENSED UNAPPOINTED	ETHNIC BACKGROUND	UNLICENSED	ETHNIC BACKGROUND	VACANCIES
23	11 Asst.Princ. (DES) 1 Asst.Princ. (JHS)	1 Asst.Princ.JHS 9 Asst.Princ.DES	White White	0		3 Asst.Princ. (DES)		0
24	2 Asst.Princ. (Elem.)	0		0		0		2 Asst.Princ.DES
25	0	0		0		0		1 Asst.Princ.DES 3 Asst.Princ.JHS
26	0	0		0		0		2 Princ. DES
27	1 Supv. of Library	0		0		0		0
28	0	0		0		0		3 Princ.DES 5 Asst.Princ.DES 2 Asst.Princ.JHS
29	2 Asst.Princ. (DES) 1 Asst.Princ. (JHS-Science)	1 Asst.Princ.JHS (Science)	White	0		1 Asst.Princ. (DES)	Black	0
30	0	0		0		0		1 Princ.JHS 4 Princ.Elem. 1 Asst.Princ.JHS
31	0	0		0		0		0
32	0	0		0		0		2 Asst.Princ.DES

Summary-4

DISTRICT	SUPERVISORY POSITIONS ABOLISHED	UNDER THE BOARD OF EDUCATION'S EXCESSING RULES: NUMBER SUBJECT TO INTERDISTRICT EXCESSING	ETHNIC BACKGROUND	NUMBER OF ACTING SUPERVISORS SELECTED UNDER SPECIAL CIRCULAR #30 WHO WOULD BE TERMINATED UNDER THE PROPOSED EXCESSING PLAN OF THE BOARD OF EDUCATION: LICENSED UNAPPOINTED	ETHNIC BACKGROUND	UNLICENSED	ETHNIC BACKGROUND	VACANCIES
Central Headquarters Programs	1 Dist.Supv. Attend.Officer 5 Supv. of Early Childhood 1 Asst.Princ. (DES)	5 Supv. of Early Childhood 1 Asst.Princ.DES	White White	0		0		1 Assistant Administrative Director 1 Asst. Princ.DHS (Hearing Officer)
Special Education	0	0		0		0		13 Supv.-Special Education 3 Supv.-School Psychologist 2 Supv.-Social Worker 1 Director of Attendance

ACTING PERSONNEL

HIGH SCHOOLS	APPOINTED	ETHNIC BACKGROUND	LICENSED UNAPPOINTED	ETHNIC BACKGROUND	UNLICENSED	ETHNIC BACKGROUND	VACANCIES
7 Asst. Prin. (Supervision)	1 Asst. Princ. (Home Economics) 1 Asst. Princ. (Fine Arts)	White White	1 Asst. Princ. (Industrial Arts) 1 Asst. Princ. (Art) 1 Asst. Princ. (Business)	White White White	1 Asst. Princ. (Nursing) 1 Asst. Princ. (Photography)	White Black	1 Princ. DHS 8 Asst.Princ. (Admin) 11 Asst.Princ. (Supervision) (Physical Science, 2 Music, Building Trades, Health, Business, 2 English Metal Trades, Social Studies, Biological Science)

Summary-5

J 147a

Summary

J 148a

Annual Census of Elementary and Junior High School Population Annexed to Affidavit of Frank C. Arricale

[PHOTOSTATS]

(Opposite) ☛

ELEMENTARY AND JUNIOR HIGH SCHOOL--ANNUAL CENSUS OF SCHOOL POPULATION

DIST.	TOTAL NUMBER OF PUPILS				PER CENT OF TOTAL REGISTER																	
					PUERTO RICAN			OTHER SPAN. SUR. AMER.			BLACK			AMER. INDIAN			[illegible]			[illegible]		
	Oct. 1971	Oct. 1972	Oct. 1973	1971-73 ±	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973
1	17,994	17,079	16,295	- 1,699	68.8	69.7	69.9	2.7	2.9	3.0	15.1	14.8	14.0	0.0*	0.1	0.0*	5.3	5.4	6.0	8.1	7.1	7.1
2	22,028	22,160	21,554	- 474	27.3	26.8	25.8	4.6	4.5	4,3	14.1	15.3	16:3	0.1	0.1	0.1	21.3	21.7	22.3	32.6	31.6	31.2
3	21,209	20,135	19,122	- 2,087	22.6	22.9	21.8	10.6	11.1	11.8	52:1	52.0	52.4	0.0*	0.0*	0.0*	1.3	1.4	1.3	13.4	12.6	12.7
4	19,975	17,582	16,479	- 3,496	62.7	62.9	62.0	1.0	0.8	1.1	34.3	34.9	35.4	0.0*	0.0*	0.0*	0.4	0.3	0.3	1.6	1,1	1.2
5	23,472	21,275	19,786	- 3,686	12.4	11.6	11.4	2.0	1.9	2.2	84,7	85.4	85.5	0,0*	0.0*	0.0*	0.3	0.3	0.3	0.6	0.8	0.6
6	19,187	18,659	18,050	- 1,137	19.2	18.9	19.8	31.6	34.3	35.7	31.2	30.4	28.3	0.0*	0.0*	0.0*	1.5	1.4	1.6	16.5	15.9	14.6
7	30,214	28,076	26,028	- 4,186	64.0	63.3	63.4	2.1	2.1	2.5	32.2	33.1	32.9	0,0*	0.0*	0.0*	0.1	0.1	0.1	1.6	1,4	1.1
8	34,075	32,737	31,217	- 2,858	43.9	43.3	43.7	3.3	2.9	2.6	31.9	34.2	35.2	0.0*	0.0*	0.0*	0.4	0.4	0.5	20.5	19.2	18.0
9	36,469	37,179	37,013	+ 544	44.9	44.3	44.2	3.4	3.6	3.5	45.4	46.9	48.3	0.1	0.1	0.0*	0.5	0.8	0.7	5.7	4.3	3.3
10	28,083	28,598	29,304	+ 1,241	27.5	27.5	33.7	2.6	5.1	3.0	22.9	24.0	24.2	0.0#	0.1	0.1	2.6	3.0	3.0	44.4	40.3	36.0
11	28,172	27,963	26,758	- 1,414	13.2	14.2	15.2	1.1	1.2	1.2	37.4	39.3	40.8	0.0*	0.0*	0.0*	0.6	0.7	0.9	47.7	44.6	41.9
12	35,045	32,116	29,737	- 5,308	55.9	55.0	54.6	2.7	2.6	2.8	38.4	39.5	40.1	0.0*	0.0*	0.0*	0.2	0.2	0.2	2.8	2.7	2.3
13	25,313	23,920	22,337	- 2,976	20.0	18.3	18.1	1.5	1.2	1.5	75.0	76.6	77.2	0.0*	0.0*	0.0*	0.3	0.3	0.3	3.2	3.1	2.9
14	29,060	27,801	26,654	- 2,406	61.6	61.7	61.5	3.0	3.0	3.2	25.5	25.5	24.9	0.0*	0.0*	0.0*	0.6	0.7	0.8	9.3	9.1	9.6
15	26,262	25,750	25,122	- 1,140	48.6	49.6	50.0	3.6	3.4	3.8	17.5	17.9	17.8	0.0*	0.1	0.1	1.3	1.2	1.3	29.0	27.8	27.0
16	37,728	36,432	18,259	- 19,469	31.9	32.7	13.1	1.4	1.4	0.4	59.9	58.8	86.1	0.0*	0.0*	0.0*	0.1	0.1	0.0*	6.7	7.0	0.4
17	25,769	25,647	26,142	+ 373	11.9	11.2	10.9	2.9	3.0	2.7	75.9	76.8	77.8	0.0*	0.0*	0.0*	1.5	1.7	1.6	7.8	7.3	6.3
18	20,952	20,450	20,182	- 770	6.3	6.7	7.5	1.3	1.2	1.2	37.3	39.8	44.0	0.0	0.0*	0.0*	0.8	0.9	0.9	54.3	51.4	46.4
19	37,355	35,929	29,677	- 7,678	35.0	34.1	33.6	2.2	2.3	2.0	51,4	53.5	54.5	0.0	0.0*	0.0*	0.3	0.3	0.3	11.1	9.8	9.6

Census-1

Elementary and Junior High School Annual Census of School Population

D.D.	TOTAL NUMBER OF PUPILS				PER CENT OF TOTAL REGISTER																
					PUERTO RICAN			OTHER SPAN. SUR. AMER.			BLACK			AMER. INDIAN			ORIENTAL			OTHER		
	Oct. 1971	Oct. 1972	Oct. 1973	1971-73 ±	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973	1971	1972	1973
20	27,344	27,054	26,406	- 938	11.6	12.3	13.8	1.8	1.9	2.0	11.4	10.8	10.1	0.0*	0.0*	0.0*	1.8	2.2	2.5	73.4	72.8	71.6
21	28,000	26,914	26,080	- 1,920	9.8	10.6	11.6	1.2	1.2	1.4	16.0	16.4	17.6	0.0*	0.0*	0.0*	1.0	1.3	1.5	72.0	70.5	67.9
22	27,828	26,849	26,290	- 1,538	2.4	2.8	3.7	1.2	1.3	1.2	14.3	16.0	17.2	0.0*	0.0*	0.0*	1.4	1.6	1.9	80.7	78.3	76.0
23	24,049	21,815	20,053	- 3,996	22.3	21.1	19.5	1.0	0.5	0.7	75.9	77.8	79.1	0.0*	0.0*	0.0*	0.1	0.1	0.1	0.7	0.5	0.6
24	23,845	24,008	24,418	+ 573	3.4	4.5	5.3	17.6	18.0	18.5	11.5	11.7	11.7	0.0*	0.0*	0.0*	3.4	4.0	4.7	64.1	61.8	59.8
25	26,060	25,717	25,349	- 711	2.1	2.5	2.4	3.9	3.9	4.6	12.4	13.5	14.8	0.0*	0.1	0.1	3.8	4.3	4.7	77.8	75.7	73.4
26	20,042	19,238	18,259	- 1,783	1.1	1.3	1.4	0.9	1.0	1.1	19.0	20.4	20.5	0.0*	0.0*	0.0*	1.2	1.5	2.0	77.8	75.8	75.0
27	30,071	29,397	29,	- 791	5.1	6.1	7.0	1.4	1.7	1.7	32.0	33.0	33.7	0.0*	0.0*	0.0*	0.5	0.5	0.6	61.0	58.7	57.0
28	27,495	26,481	25,450	- 2,045	3.9	4.2	5.4	5.5	6.3	6.5	47.9	49.4	49.9	0.0*	0.1	0.0*	2.8	3.0	3.6	39.9	37.0	34.6
29	25,519	26,026	26,206	+ 687	3.5	3.7	4.3	2.2	2.5	2.6	65.4	67.9	69.6	0.0*	0.0*	0.1	0.8	0.9	1.0	28.1	25.0	22.4
30	24,246	23,888	23,550	- 696	6.4	7.0	7.7	12.1	12.8	12.5	21.4	21.0	21.4	0.0*	0.0*	0.0*	2.8	3.4	4.0	57.3	55.8	54.4
31	38,064	39,081	39,928	+ 1,864	2.9	3.2	3.2	1.0	1.0	1.0	9.3	9.3	9.8	0.0*	0.0*	0.0*	0.7	0.8	1.0	86.1	85.7	85.0
32*			21,235				53.4			2.6			32.2			0.0*			0.3			11.5

*Less than 1/10th of 1 per cent

* District 32 is comprised of eleven schools from District 16 and three schools from District 19.

Census - 2 + 10

J 149a

LAW OFFICES
FRANKLE & GREENWALD

Letter dated September 27, 1974, from Leonard Greenwald to Tyler, J.

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011
(212) 242-0200

MAX H. FRANKLE
LEONARD GREENWALD
SHELDON SCHORER

September 27, 1974

Hon. Harold R. Tyler, Jr.
Judge, United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Boston M. Chance et al. v. Board of Examiners et al.
70 Civ. 4141

Dear Judge Tyler:

I have on this day received a copy of "Plaintiffs' Supplemental Memorandum" dated September 25, 1974. Because of certain misconceptions contained in that document, I feel obliged to answer.

The first misconception involves the plaintiffs' claim that the overwhelming majority, if not all, of the supervisors potentially in excess are members of either plaintiffs' class or are acting supervisors. From the information available to the CSA, we estimate that approximately 15 to 20 percent of the excessed supervisors are tenured supervisors. By tenured supervisors we mean individuals who were licensed and appointed and have been serving on the average for at least seven years. For example, I am advised that the ten assistant principals (white) excessed by Community Board 23 are licensed, appointed, and tenured. At least two of the assistant principals facing excessing in the high school division are similarly licensed and appointed. In addition, there are a number of supervisors at the community board level who have volunteered for excessing. These supervisors volunteered as a way of securing a transfer out of the district.

In reviewing the summary of Mr. Arricale, the CSA utilized as the number of vacancies available those figures which were shown in the individual breakdown. We believe this more accurately reflects the number of vacancies available.

As to the categories of "unlicensed acting", plaintiffs' position is equally deceptive. A number of these unlicensed individuals are supervisors who failed the on-the-job examination. The appointing authorities,

Letter dated September 27, 1974, from Leonard Greenwald to Tyler, J.

i.e., the community boards, have apparently developed some reticence about appointing supervisors who failed the minimal standards of the examination. The CSA does not believe that the Court will require school boards to appoint individuals who failed an examination and whose service is thus put in question.

This problem is further complicated by the fact that there are a number of supervisors as well as teachers eagerly pursuing these positions. I have also been advised that the Board of Education has accumulated a budget fund of approximately $300,000 for the purpose of salary disbursement to excessed supervisors who cannot be immediately placed in an appropriate position. This fund, we believe, will eliminate any possibility that a supervisor would be demoted as a result of excessing.

We respectfully urge that the Court adopt the CSA's plan for excessing.

Respectfully yours,

LEONARD GREENWALD

LG:bsw
cc: Elizabeth B. DuBois, Esq.
Jeanne R. Silver, Esq.
Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Michael Rebell, Esq.

J 1521

Letter dated September 30, 1974, from Michael A. Rebell to Tyler, J.

REBELL & KRIEGER

ATTORNEYS AT LAW

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DENNIS C. KRIEGER

WESTCHESTER OFFICE
90 MAPLE AVENUE
WHITE PLAINS, NEW YORK 10601
(914) 949-5525

September 30, 1974

Hon. Harold R. Tyler, Jr.
United States District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

Amicus curiae New York City School Boards Association has recently been served with various affidavits and briefs by the parties relating to the "excessing" issue currently pending before the Court. Amicus curiae does not wish to further burden the record in this case by attempting to answer all the specific arguments and analyses that have been put forward.*

However, we believe that the conflicting specific requests for relief proposed by the parties do not in any way provide a reasonable basis for an equitable resolution of the present problem. Defendant Board of Education and intervenor C.S.A. would have the Court totally overlook the serious injuries to be suffered by the members of the plaintiff class by implementing strict seniority, inter-district excessing. Plaintiffs, on the other hand, request an indefinite injunction against the excessing of supervisors appointed since September 21, 1971; this proposal would mean

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* The issue of the formal appointment of recently-licensed supervisors raised in various forms by all the parties clearly requires further comment by amicus curiae because significant powers and duties of the community boards under the State Education Law are at stake. Since plaintiffs have indicated (Br. Sept. 25, 1974, p.6) that they intend to submit a separate letter on this point, however, we will defer further comment pending such submission.

Letter dated September 30, 1974, from Michael A. Rebell to Tyler, J.

either that no excessing at all would take place (and the system would be forced to bear the expense of retaining surplus personnel), or that only long-tenured employees would be transferred or discharged, despite the obvious administrative and morale problems involved.

Because of the extreme stances of the parties concerning requested relief, amicus curiae feels it necessary to present in brief form the following outline of a proposal which we believe would most equitably resolve the current impasse. This proposal is based on evidence presented by defendant concerning the on-going creation of numerous supervisory vacancies throughout the year, and the dictates of existing excessing rules and Ed. Law § 2585(5) granting priority re-appointment rights to excessed personnel. Specifically, we would propose that:

1) All supervisors properly declared in excess (either on the basis of strict seniority or on the basis of modified seniority as proposed by plaintiffs) be placed in an "excessed personnel pool".

2) Supervisors in the "excessed personnel pool" would continue to be paid from central reserve funds already available for this purpose and would retain a formal status for seniority and re-appointment purposes as employees of their original community districts or central agencies.

3) While awaiting the opening of new vacancies in their home districts or agencies, such individuals would be available for temporary assignment on an "interim acting" basis to appropriate vacant positions anywhere in the City School District of the City of New York. While an assigned supervisor temporarily filled such an interim position, the local appointing authority would be permitted to initiate or continue Circular 30 procedures to fill the position by a regular acting appointee. The interim acting assignee could apply for regular acting appointment, if he desired, or he could opt to await re-appointment to the first available vacancy in his home district.

In short, under the above three-point plan, there would be no bumpings, no lay-offs, and no mandatory assignments of personnel against the interests of all concerned. Temporary budgeting exigencies could be satisfied without

Letter dated September 30, 1974, from Michael A. Rebell to Tyler, J.

arbitrarily interfering with the career opportunities of individual supervisors or the appointment prerogatives of the community boards and the local constituents whom they serve.

Respectfully submitted,

M.A.R.
/s/ Michael A. Rebell
REBELL & KRIEGER
Attorneys for Amicus curiae.

MR:st

cc: Jeanne R. Silver, Atty.
Leonard Bernikow, Esq.
Leonard Greenwald, Esq.
Saul Z. Cohen, Esq.

J 155a

Letter dated October 9, 1974, from Leonard Bernikow to Tyler, J.

The City of New York

NEW YORK, N. Y. 10007

ADRIAN P. BURKE, *Corporation Counsel*

October 9, 1974

Hon. Harold R. Tyler, Jr.
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

This letter is submitted in response to the plaintiffs' Supplemental Memorandum regarding Application of Excessing Rules and the letter of Michael Rebell to you, dated September 30, 1974. I have prepared this letter in cooperation with Frank C. Arricale, Executive Director, Division of Personnel, New York City Board of Education.

Plaintiffs' Memorandum still neglects the basic distinction between excessing and termination. Excessing is a means of preventing termination. Plaintiffs fail to realize that supervisory positions may be eliminated in any of the 32 community districts and in the central district because of declining birth rates and the flight of both Black and White middle and working class families from the City. With the elimination of excessing rights, newly appointed Black and Puerto Rican supervisors would be as defenseless as any White tenured supervisor, and they would be in the same ludicrous position of being demoted from a supervisory position at the same time that similar comparable positions were being advertised for in vacancies elsewhere in the System.

There is no need to take such extreme measures since statistics have shown that all excessed personnel in a year's period can be more than accomodated within the System due to supervisory vacancies each year. The Division of Personnel statistics demonstrate that except for one year when there were over 600 supervisory personnel who left the System, the yearly attrition rate of

Letter dated October 9, 1974, from Leonard Bernikow to Tyler, J.

supervisory personnel is between 225 and 275. The maximum of supervisory personnel appointed and acting slated to be excessed in one year has not gone beyond 75. Nor is the plaintiffs' proposal that no excessing at all take place a just proposal. The System would be forced to bear the expense of excessed non-functioning personnel while at the same time advertising for and filling comparable vacancies.

The proposal of Mr. Rebell is both wasteful and contradictory. It is wasteful because it would have supervisors paid while waiting for employment in their so called "home" district while at the same time other districts within the System would not be able to utilize their services. It is contradictory in that it implies that supervisory personnel are not interchangeable from district to district for permanent appointment but are interchangeable for interim acting appointments. It is also contradictory in that it denies the right of the Central Board to relocate excessed supervisors to comparable vacancies in the System but at the same time imposes the obligation on the Central Board to pay the salaries of excessed supervisors until they secure a position in their original or so called "home" district. Mr. Rebell's proposal would give the districts all the rights relative to their excessed supervisors but none of the obligations and conversely would give the Central Board all the obligation concerning excessed supervisors without any rights in their ultimate placement.

Mr. Rebell's proposal is fiscally misleading. If districts do not have funds to pay non-functioning excessed supervisory personnel by what magic does the Central Board have such capability? Funds for the districts and the Central Board come from the same one total amount of educational monies supplied by City, State and Federal governments.

One further note, the Central Reserve fund for excessed personnel which has been used for teachers and others awaiting assignment has been seriously depleted and could not at this time bear the burden of additional excessed personnel. Excessed attendance teachers which are clearly the responsibility of the Central Board have been placing a severe strain on the fund because so many districts have eliminated attendance teachers

Letter dated October 9, 1974, from Leonard Bernikow to Tyler, J.

positions. It must be also noted that the City Council and the Mayor's Office have put heavy pressures on the Central Board to reduce Central staff and operating funds. In any event whether non-functioning supervisory personnel would be paid out of district reserve funds or Central Reserve funds, the same taxpayer would be paying for superflous staff while at the same time obligated to pay for replacement staffs in comparable vacancies in other parts of the System.

Respectfully yours,

Leonard Bernikow
Assistant Corporation
Counsel

cc: Sam Z. Cohen, Esq.

Jeanne R. Silver, Atty.

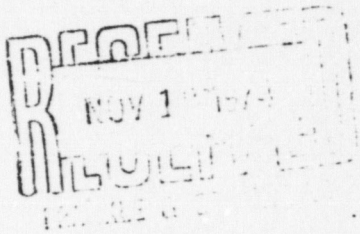
Leonard Greenwald, Esq.

Michael Rebell, Esq.

Transcript of Proceedings dated October 10, 1974

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK



----------X

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs,

-against- 70 Civ. 4141

THE BOARD OF EXAMINERS and the BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------X

New York, N.Y.
October 10, 1974
3:30 p.m.

Before:

Hon. HAROLD R. TYLER, JR.,

District Judge.

Appearances:

ELIZABETH B. DU BOIS, Esq.
JEANNE R. SILVER, Esq.
Attorneys for Plaintiffs

ADRIAN P. BURKE, Esq.
Corporation Counsel,
City of New York
LEONARD BERNIKOW, Esq.
Assistant Corporation Counsel

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, Esqs.
Attorneys for BOARD OF EXAMINERS
HOWARD A. JACOBSON, Esq.,
of Counsel

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Appearances (Continued):

FRANKLE & GREENWALD, Esqs.
Attorneys for COUNCIL OF SUPERVISORS
AND ADMINISTRATORS
LEONARD GREENWALD, Esq.,
of Counsel

MICHAEL A. REBELL, Esq.
Attorney for NEW YORK CITY
SCHOOL BOARDS ASSOCIATION
Amicus Curiae

* * * * *

(Case called.)

THE COURT: Ladies and gentlemen, I take it you all agree you would like this recorded?

MR. GREENWALD: I have no objection.

THE COURT: It's not a question of objecting, but what is your pleasure?

MR. GREENWALD: We would prefer if it were recorded, your Honor.

THE COURT: All right.

There is a preliminary -- perhaps I shouldn't say preliminary. By saying preliminary I don't mean to diminish it. This is the issue of compliance with the 3B paragraph 3 of the July 12th, 1973 final judgment.

You remember this summer, and perhaps I should say that I remember that this summer, specifically on July 30 at the hearing, the Court fixed yesterday as a target

date for completion of the 3B examinations. I believe that I held it open to the Board that we could put the date off if the hard-pressed examiners asked for it with good reason.

Miss DuBois, I hope I am stating this accurately. I think Mr. Jacobson, who is appearing here today for Kaye, Scholer, would certainly agree with this, but I am not sure you would.

MISS DU BOIS: I would. What I remember exactly was that the Court said when Dr. Rockowitz returned from vacation, or Mr. Cohen asked that when Dr. Rockowitz returned from vacation, he be given an opportunity to indicate to the Court if that date of October 9 was not realistic.

THE COURT: Unfortunately, I think you may be right about that, too. But yesterday you and I, I assume, and everybody else, received a letter from Mr. Howard Jacobson, which, as far as I know, is the first response in which he, in behalf of the Board of Examiners, would like to extend the date to December 31. I believe that if there were any extension, there are only two examinations to be completed which would be affected. I am putting this somewhat simplistically, but in our case potentially there would be persons involved in the plaintiffs' class, let me put it that way.

Is that a fair statement?

MR. JACOBSON: Your Honor, I believe that the fact is that of the titles covered by 3B, which still have not been completed, there is only one title which I understand could possibly have an effect upon that title and I believe, at most, there are two people who are in that class.

THE COURT: You are putting more precisely what I was saying simplistically. Yes, that is putting it better.

MR. JACOBOSN: I should also note that on August 9 Dr. Rockowitz sent a letter to the Court with copies to all counsel, I believe setting forth a status report of the 3B exams at that time.

THE COURT: You are correct. That is right.

MR. JACOBSON: I don't know if he actually asked for a change in the tentaive target date.

THE COURT: My understanding, or perhaps I should say my recollection of that letter -- which you are certainly correct, he did send it. I don't think he spoke to this issue but I may be wrong on that.

MR. JACOBSON: He did not ask for a change in the tentative date.

THE COURT: In other words, here we are.

MR. JACOBSON: Right.

THE COURT: Miss DuBois, do you wish to object to this in any way or do you have some counter-objection or suggestion or what?

MISS DU BOIS: Miss Silver is going to deal with this and other issues before the Court.

THE COURT: You are just a spectator then?

MISS DU BOIS: Yes.

MISS SILVER: It's our position that three months is far more than a minor change in the target date. We think it's extremely unfair for people involved, not confined to members of plaintiffs' class, to overlook a plan which contemplated simultaneous licensing of all people entitled to the license.

The statement that there would be no prejudice to these people is, I am sure, meant in the best of faith but it's obvious that to be unlicensed when many people are licensed, competing for positions and serving in positions from which they can be dropped, is a disadvantage.

THE COURT: What are you going to suggest in lieu of the end of the year?

MISS SILVER: We would suggest an earlier date with some sort of sanction that would assure that it would be a real date rather than one more unmanned deadline.

THE COURT: That sounds like you are asking the

Court to utter a threat. You may be right, I will have to sometimes sanction the Board, but I don't think we should utter threats now. I have a hard enough time figuring out what is going on up to this point, let alone forecasting the future.

What do you suggest as a date?

MISS SILVER: I think six weeks would be sufficient in view of the fact that October was the original target date.

MR. JACOBSON: May I make a couple of points, your Honor?

THE COURT: Yes.

MR. JACOBSON: One is, as set forth in our letter, the most substantial of the remaining exams is the one for principal of a day high school. I understand that there are approximately 600 persons that must be tested in one way or another with respect to the remaining 3B examinations. Over half of those persons who must still be tested are people who must be tested for this principal of a day high school.

It is really that undertaking which requires the request that December 31 be the completion date for all of this work. I should make one other observation.

When the Court set this tentative target date

it was, I believe, July 30. We were in the middle of the summer. None of the applicants were available at that time for testing and none of the experts who would be required to give the tests were available. The first possible time that these people were all called together and available for testing was the beginning of the school year.

As pointed out, it would probably have been prejudicial to the applicants to have been tested at the very beginning of the school year.

THE COURT: I am aware of the vacation problem, particularly in a city like this where half of our days in a year are in one way or another vacations in this area and other areas such as the legal profession.

It's a sad thing but true, people don't work very hard very often in certain periods of the year. I was aware of that.

But look, let me point out to you, Mr. Jacobson, that this case is, as I said many times, and as the Court of Appeals has said many times, so old that it's pitiful. We can't seem to get anywhere and then every time that something happens a new issue arises. One despirs of seeing any resolution of this controversy because when it's put to rest in its original form, up comes another form. We are faced with this excessing issue which, in my opinion, is one

of the most difficult issues which can be presented in the law at this time and in any forum. I appreciate the City's problems but I really think I agree with Mrs. Silver that the end of the year is long.

I think six weeks, as she suggests, is eminently fair.

MR. JACOBSON: Your Honor, I am sure that the Board of Examiners could meet the six-week date for every other exam but the principal of day high school, which is a rather substantial undertaking. That is the reason why December 31 was requested. The Board has been attempting and has no reason not to attempt these procedures. The first thing we tried to do is get the acting, on-the-job evaluation exams completed. Unfortunately, or fortunately, depending on how you look at it, there happens to be another lawsuit in which a Judge of this Court is directing the Board to complete other aspects of this. I am sure, as I say --

THE COURT: If I may say so, that is a poor excuse. This is a suit that deserves priority over that in terms of time. That was just filed a few months ago, as we all know. I am sorry, but I don't take that as much of an excuse, even if I have to interject myself with the Judge in the case.

I don't see that is any excuse at all. Let's get

this case over with first.

MR. JACOBSON: I can assure you that is the interest of the Board of Examiners. If there is some provision for this one exam we can be back here in six weeks and say that all these other ones are finished.

THE COURT: Let me ask you this: Can you tell us whether or not there would be little or no impact insofar as the classes of persons represented in our suit in this day principal exam? I don't think you can.

MR. JACOBSON: Your Honor, as I understand, with respect to the day high school principal's position, there would be no impact of the excessing question until the next semester which would be February. As I mentioned before, I believe that the only one of the remaining 3B examinations that could possibly have --

THE COURT: If that is what you are willing to represent what I will do is this: I will require that the Board complete all exams other than the day principal exams within four weeks of today, or most particularly no later than November 11, which is a Monday. Then I will go along with you as far as that particular class until the end of December on the representation that there will be no excessing problem until the mid-semester time, namely, February of 1975.

But, believe me, if there comes a time when the

Board claims that they are being whip-sawed between the two cases, I would suggest most strongly that you bring it to the attention of Judge Griese and myself. I don't believe that either he or I would disagree that we ought to get this case out of the way. Let's face it, it deserves it in terms of priority and in terms of common sense I think he would support that. My view of Judge Griese is that he is high on intellectual powers and common sense and I am sure I can work it out for your benefit. Please don't tell me you can't do something because of the other lawsuit. Tell me what the problem is and perhaps the other Judge and I can work it out. I mean that. We have to use common sense. This case is difficult enough with it and when we don't use common sense it's very bad.

The next issue --

MISS SILVER: Excuse me, your HOnor, apropos of what was just decided, I would like to just get one clarification. Could we have a report of the results on November 11?

THE COURT: Yes.

MISS SILVER: Is that implicit in what you said?

THE COURT: That is a fair question, Miss Silver. We should have a report. I intended this and I assume Mr. Jacobson and Dr. Rockowitz assumed this. I assume on

November 11 we can have a report on those people other than the day principals.

MR. JACOBSON: We will have to do that, your Honor.

THE COURT: Let's turn to the excessing issue. Let me say that I would like to put this question to you initially. As is typical in this case, nobody in his papers or his brief has agreed on anything. The Board is in disagreement with the plaintiffs and the Community Board and Mr. Greenwald's organization. Everybody is in flat disagreement on everything known to man.

What is this case called in the state courts?

MR. REBELL: The state court excessing case?

THE COURT: Yes, sir.

MR. REBELL: CSA versus Board of Ed.

THE COURT: When is that going to be determined or heard or whatever?

MR. REBELL: Later this month or some time in November.

THE COURT: Do you really think so or is this the old game? What do you think?

MR. REBELL: We had asked for a preference in that hearing to be determined over the summer and they denied the preference and said it would be on in October or November.

I have not pressed the calendar clerk up in Albany pending the results here. If you like I could place a call there the first thing tomorrow morning.

THE COURT: Here is what I think: I think the evidence in the record in this case is singularly inconclusive for me to make a final determination on excessing problems.

Furthermore, I believe that excessing is a many-faceted issue and a difficult one at best. But in part I believe -- and when I say the words "in part", I think in substantial part -- this is a state question. Therefore, I wonder why a federal court like this should be jumping into the fray now knowing full well that the high court of this state is about to hear and determine a matter at least from the point of state law. I am wondering why I shouldn't continue to hold in force the present order prohibiting interdistrict excessing until we see what the high court of the state does in that case. Particularly since I feel in reading your briefs that we are as far apart as we can possibly be. Nobody agrees on anything. Not only that, I am sorry to say that I believe I can think of a few questions that none of you have thought about which I think may be highly relevant before any final order is entered in this case.

Certainly I am not prepared to do the drastic

relief which the plaintiffs' lawyers would have me do. I think it would be most unfortunate even from their client's point of view if I did that. So I put it to you, if our state's high court is going to hear and determine this issue from state law, why wouldn't it be a prudent idea to continue a stay against any interdistrict excessing until such time as the Court of Appeals passes on the state law issue or issues inherent in the excessing questions?

In the meantime I think more information can be garnered than has already been garnered by counsel here so far as the effect on our class is concerned.

What do you think of that, Miss Silver?

MISS SILVER: Your Honor, particularly in view of your suggestion that more information be garnered, I think it would be acceptable to us. We don't necessarily agree that the state court decision will dispose of all the issues --

THE COURT: I am not saying it will either. Aside from what I believe on sound notions of federalism, I believe that the state court reports some directions at least for us and I don't think a federal district court should be jumping in willy-nilly, but particularly when there is some real possibility that state law resolutions may cast some light on the problem.

MISS SILVER: And make it somewhat less complex.

THE COURT: I agree with you. I don't think a federal court should shirk its duty if it turns out that there are still some residual serious constitutional issues, I agree with that.

All I am suggesting is that if we were to settle back, I think it would also be advantageous to the Board, the Central Board, and the Community Board, if this approach were taken.

MISS SILVER: Meanwhile I assume the present injunction would be maintained in effect?

THE COURT: That is part of what I am suggesting.

What do you think about that, Mr. Bernikow?

MR. BERNIKOW: Your Honor, we would not like that solution to be carried out. I have Mr. Arricale here and I would like him to talk to that issue to tell you the burden that that solution would place both on the Central Board and on the local districts.

If I may, I would like to have Mr. Arricale present this.

THE COURT: We certainly would be glad to hear from him, but before we do, let me hear from Mr. Greenwald and Mr. Rebell briefly.

What would their reaction be to this?

MR. GREENWALD: Your Honor, I think the reaction is that the suggestion as thrown out by the Court is a reasonable approach and will work no hardship on anyone, including any effective member of the class which CSA represents. We believe that the Court of Appeals' decision, when rendered, and to my knowledge it's the first Court of Appeals' decision dealing with this issue of excessing, at least since decentralization, may well give you guidelines and direction.

I think I can indicate on behalf of CSA we would have no objection, as I understand it, to basically a continuation of the stay including the circular 30 prohibition, is that correct, your Honor?

THE COURT: Mr. Rebell?

MR. REBELL: Your Honor, I would agree that on the basic point of awaiting further clarification from the state court it is a sound approach. However, two specific details of continuing the present injunction continue to disturb me and those details are, first, the question of continuing to prohibit the announcement of vacancies. Realistically, to await the decision of the Court of Appeals, even if we have the argument mid-November, we are talking of three, four months. That means we are not going to be able to advertise each position. We won't be able to fill them

until the end of the year.

I strongly repeat the request that that aspect of the injunction be taken out.

THE COURT: In other words, that the Boards be permitted to have a class in effect?

MR. REBELL: To begin the process. The process takes a minimum of four months, I believe. I would say it would be reasonable to hold off their ability to make the actual appointments but let the process proceed.

THE COURT: I am doing this simplistically but is it fair to say to put out both notifications and process?

MR. REBELL: Yes.

THE COURT: I think that is a serious and persuasive point. I am inclined to think that you may have something there. I don't know how Dr. Arricale, from the Central Board, will feel, but I would think from both the Community Board's point of view and the Central Board's point of view it might make a certain amount of sense.

MR. REBELL: One more point needs to be mentioned and I assume Mr. Arricale will bring it up. That is the question of payment of those people who are being held in a holding position while this injunction is in effect. It is my understanding that the central reserve fund that was put into effect for this purpose -- and they are paying people

while it is unclear what would happen with them and whether they are transferred -- has been picking up the tab to date. The questions are going to arise again if we are talking about an extended period of who is going to pay for this and one way or another, I know it's going to be the taxpapers of the city.

But I believe it's a complex question as to whether it should be the Community Board or the Central Board and some more attention should be given to this. Offhand, I don't want to suggest an immediate solution until I have heard from Mr. Arricale and checked with my clients. But if there is a problem in that regard I would like to request an opportunity to bring that to your attention some time before the Court of Appeals' situation is resolved.

THE COURT: All right.

Mr. Bernikow, do you want to have Mr. Arricale take the stand as a witness?

MR. BERNIKOW: If that is your Honor's pleasure, we can do that.

THE COURT: What is your view first?

MR. BERNIKOW: I actually have no preference. I had anticipated that he would talk as my associate but if you want him to take the stand, I have no objection.

THE COURT: I consider him as both the fact and

expert witness, don't you?

MR. BERNIKOW: We will put him on the stand.

THE COURT: I don't mean to be diminishing him by that, quite to the contrary.

MR. GREENWALD: May I voice at this point our objection to a discontinuance of the restrictions over circular 30? I would like to voice our objections--

THE COURT: I know you do. You pretty much made that clear in your papers. Before we are through you can repeat that.

MR. GREENWALD: Thank you, your Honor.

F R A N K C. A R R I C A L E, called as a witness on behalf of the defendants, having first been duly sworn by the Court, was examined and testified as follows:

MR. BERNIKOW: Your Honor, I am going to let Mr. Arricale talk without questions, if that is agreeable to you.

THE COURT: That is all right. Whatever you want to do, you do it.

THE WITNESS: First to the continuance of the injunction, I think it would work a severe hardship both financially and administratively. Administratively, even if one were to allow the advertisements to begin now, the question could arise that in some districts and perhaps even in Central, the procedures would go more quickly than in others, so that it is possible after the 30 day adertisement. Some districts would be ready to bring people on so that when Mr. Rebell says it would take three to four months, that is not true universally.

It would vary district to district. Some districts have been waiting to fill the positions so that after the 30 day period they would be ready to put people right in.

Secondly, the fiscal situation is really

horrendous. This injunction has put me in conflict with my boss. The Deputy Chancellor has been insisting that the districts remain in the black, that they do not go into the red because we had serious constitutional problems when that happened before.

At the same time I have stopped any of the districts from letting superfluous supervisors go and they are bearing the burden of superfluous supervisors, at the same time that these supervisors could be utilized because there are vacancies for them.

The so-called slush fund, or the so-called excessing fund, has already been severely strained because of the diminution in the number of attendance teachers in the city. Since decentralization in the districts have been eliminating attendance teachers and supervisory positions in attendance.

We have been maintaining these people as we have been trying to place them throughout the 32 districts. The fund cannot bear the enormous cost that all the 32 districts' excessees, as well as the Central Board's excessees, would have to be bearing. It is by no means certain that the cost will not be borne by the individual districts up to now. This was a question that was supposed to be negotiated between the Central Board and the districts in regard to this

interim period and it has not been negotiated.

Up to now the districts are bearing the costs of the excess supervisors whom we have in effect frozen in their positions and have forced the districts to continue paying.

MR. BERNIKOW: Subject to your approval I would like Mr. Arricale, at this time, to indicate the effect of the Board's excessing plans to further explain the summary that I submitted to you a few weeks ago as well as his affidavits to the Court.

THE COURT: All right.

THE WITNESS: If I may, I see the differences, as your Honor pointed out very well, really as a continuum here.

On the one hand would be those who'd say, "Eliminate completely all of the excessing rules and rights." I would find that totally destructive of the school system and I think your Honor has indicated that and it would cause enormous racial and ethnic problems in the city that would then multiply, particularly in a polyglot ethnic city -- not only a polyglot ethnic city, but a polyglot ethnic city particularly since white ethnics are asking for positions similar to blacks and Puerto Ricans under Title 7.

The other position would be that all acting

supervisors be given excessing rights so that whether or not a supervisor has actually been appointed by a Community School Board or whether or not he or she has taken or has received the results of the on-the-job examination, that person who would have served a year and a day will have had excessing rights throughout the system, or if that person has served five months and a day, he would have excessing rights within a district.

That was CSA's position. The Board of Education's position is really mid-way between the two. It would give excessing rights to all appointed supervisors and that group would be larger than our columns would suggest if we made it automatic that upon licensing these actors would become appointed. In previous times a person would have to be licensed before he or she was appointed. Today we are quasi-appointing them via assignment and then people are assigned. We would like to bring the two processes together and make appointment automatic with licensure. That would extend the Board of Education's excessing rights to a much larger group. It would still leave uncovered those who had not taken the examination. The CSA plan would take care of that group.

I would urge the Court very strongly, because I know the problems of the districts in maintaining these

people, because also, your Honor, even our vacancies are not a clear picture that we gave you in August. You must recognize that a supervisor does better resigning after September 5, so that the supervisor can be paid for the entire summer period. So that our figures that we gave you on vacancies really were figures that were in effect as of June 30 and there are much larger figures that come about after September 5 so that these supervisors would be paid for the summer.

Also, you get a larger number of supervisors retiring or resigning in February because during this term they begin to put the house in order and -- particularly if they are assistant principals -- they help the principal to prepare for their going and also -- and I don't want to be comical, but the weather is not as bad up here until February when they would retire to Florida for the cold season. So that in effect our figures that we gave you are rather deceptive in terms of actual vacancies. The vacancies are far more than were reported in July and in February they would come close to the annual 200 or up to 225.

THE COURT: Are you saying that you would like to see, for excessing seniority? You would, say, take the date on which a supervising person was put in a position and

JQd

licensed or is it simply --

THE WITNESS: For excessing purposes, we would like the date of their assignment to be counted, when the school board actually put them into the job.

THE COURT: But you also said that you would like to see -- you used the phrase appointment -- appointment to be automatic with licensure?

THE WITNESS: Right.

THE COURT: I am having a little trouble making sure. Are there any distinctions between the two?

THE WITNESS: Yes. Right now, as we understand, unless we have misinterpreted Judge Mansfield's original order, there are three kinds of supervisors that can exist in our system, a licensed supervisor, this is a person who has passed the on-the-job examination or was on the aborted list that was allowed to be released and then the Community School Board having received notice that these people have been licensed, then by a specific act appointed them because under the original Mansfield order they were only assigned.

Or you could have an acting licensed supervisor. This is a person who passed the on-the-job evaluation or was on the aborted list but the Community School Board either has not yet made that specific act of appointing them or for some reason, usually political, has decided not to appoint

them. Quite often because they figure these were people who were assigned under a previously elected school board.

Then, third, we have acting unlicensed supervisors. Unlicensed either because they have not yet been tested because they didn't have the five months and day when we first started the on-the-job test or because they have failed the examination for the first time.

What I would like is that this first class would be eliminated or, rather, the second class would be eliminated by having them included in the first. That as soon as you are licensed you drop the acting and you are a supervisor, period. What rights would that give a person?

If the Board of Education's excessing rules were followed, that would automatically give them excessing rights. Secondly, there is a psychological benefit. If the person were to leave that job it would look better on the resume to say that he was principal of P. S. 10 rather than Acting Principal of P. S. 10.

We would like for excessing purposes the date of actual assignment rather than appointment to be utilized, when they actually went on the job.

(Continued on page 26.)

DIRECT EXAMINATION (Continued)

BY MR. BERNIKOW:

Q I want you to clarify what you have said in your affidavits, that is the distinction between excessing and termination.

A Excessing is a means of relocation. Termination is a means of demotion. We want excessing to prevent terminations or demotions. It's ludicrous to be advertising 20 assistant principal day elementary schools and at the same time letting five experienced elementary day school prinipals go. The elimination of excessing would be precisely that.

THE COURT: Have you ever given thought to a scheme which would go somewhat as follows: First, we would suspend the present prohibition against interdistrict excessing, allow the Board to go along pretty much from the point you have expressed, except to set up a pool. This pool would consist of the people who were bumped or displaced by excessing. They would be given a right to return to what we call their home district or area if an opening in their license group appeared within, let's say, the next year or so, whenever.

Then give them a right of first refusal in this sort of priority pool. You could do this in one of two ways

and say they get priority in their so-called preferred home district or any district if they wanted.

THE WITNESS: In the meantime they would be in a kind of limbo. That would be wasteful, your Honor, because either we would have to demote them to their teaching license or they would simply be hangers-on. 110 Livingston Street has already been known as the Hilton. This would only increase that. The City Council and the Mayor have been very, very forceful with us that despite the fact that since decentralization we have increased our obligations, we have had to decrease the number of staff at Central. There is a tremendous push to decrease that and to eliminate these past practices that really were abusive.

THE COURT: All right.

Do you want to ask anything else, Mr. Bernikow?

MR. BERNIKOW: Yes. Again, this was covered in your affidavit but I want to go over it again.

What is your prognosis as to the numbers based on your summary of people that will be excessed and people that will be actually terminated?

THE WITNESS: The only people who are really in danger of being terminated --

Q By terminated, that means demotions?

A Yes, demoted. It would be people with either

one of a kind title or titles that we know now are on their way out. One of a kind titles, Assistant Principal, Latin Assistant Principal, Greek, in effect Chairman of the Latin-Greek Department -- in the areas that would be dying out. We don't expect Latin or Ancient Greek -- Modern Greek, yes, but not Ancient Greek, to be continued. A supervisor of early childhood possibly because superintendents would rather hire common branch people. Supervising attendants officers because some districts have a different philosophy of attendance services and they are eliminating attendance teachers and, therefore, would eliminate attendance supervisors. With the exception of those kinds of one of a kind titles, the bulk of supervisory titles, Assistant Principals and Principals, as you see, there is not any principal really being excessed but Assistant Principals would not lose their Assistant Principalship under interdistrict excessing. Quite the opposite, they would be able to be placed. I am personally anxious to get interdistrict excessing because I am also an equal employment officer for the Board. The districts increasing are Staten Island, Riverdale, and I would like to see Assistant Principals from the South Bronx who would be Puerto Rican and black who are being forced to be excessed because of urban renewal and model cities, to be placed in Riverdale or to be placed in Staten Island.

So I think it has not only fiscal benefits, it also has social benefits.

THE COURT Let me follow up an aspect of that.

Supposing we were to do substantially what you said but with this one refinement: Supposing we were to say, "All right, we would allow interdistrict excessing except that it will have to be made clear that people in the preferred positions can be either temporarily, or if you and they wish to do it, permanently assigned to vacancies in their license anywhere in the city but they can't bump anybody out."

Do you follow me?

THE WITNESS: Just to fill vacancies?

THE COURT: Right. My theory being if it's as you say -- even I understand when you say Principals, there is no problem. Let's take Assistant Principals and others. If you are right that there would really be, at least in a quantitative sense, very little risk of anybody being terminated, why not make absolutely certain and more palatable the people such as our plaintiffs' class and others who are similarly situated and interested if we were to provide that, all right, let's go ahead with interdistrict excessing, meaning by that that people could be either temporarily or permanently, if you prefer, appointed to

assigned vacancies in their respective licenses all over the city so long as it is abundantly clear under an order, let's say, of this Court that that means they don't bump anybody out.

I am using words that you probably don't use. Forgive me, I am not an expert. Do you see what I mean?

THE WITNESS: Yes. The only problem I would have with that, your Honor, would be with what I call the exotic titles.

THE COURT: Meaning by that --

THE WITNESS: Chairman, Latin-Greek, Supervisor, and this is a classic major saying that Supervisor of Early Childhood and Supervising Attendance Officers. Those would be the only ones that cause problems.

THE COURT: That being because --

THE WITNESS: Their services are actually being terminated, the function is dying out in the city. That would be the only problem. The only way, your Honor, I would have a correlary to that, that they wouldn't bump but that these other people could be placed, who would be bumped, placed out of license so we utilize their services --

THE COURT: In other words, sort of a proviso in there at the end that in this kind of an exotic position like that, as you put it, where there is a kind of need for

their particular profession and expertise, that we will have the right.

Supposing we were to consider those on a case-by-case basis? There can't be that many, is there?

THE WITNESS: No. In total right now, I don't think there are more than ten at the very most. I am being very generous.

THE COURT: Supposing we put up a proviso in there that if any one of these things occurred, we would consider on a case-by-case basis what would be done to be fair and still to be consistent with the final order and judgment of this case and any other constitutional or whatever problems.

Do you think that might possibly do it?

THE WITNESS: Yes.

THE COURT: Anything else?

MR. BERNIKOW: Nothing else.

THE COURT: Any of you ladies or gentlemen have any questions of Mr. Arricale?

MISS SILVER: Yes, sir.

CROSS-EXAMINATION

BY MISS SILVER:

Q I want to get a clarification of the concept of termination.

A Demotion, really.

Q Let me ask a question, if you don't mind. Under the Board's plan isn't it true that 13 unlicensed people would not have any excessing rights?

A That is right.

Q Isn't it true that you have said they would be terminated?

A I really meant demoted to the license they held before.

Q Is that how we should construe the affidavit and documentation that you submitted?

A I better be careful. It could mean both, really. You are more correct.

Q My question was as to the 13 unlicensed people who your data furnished said would be terminated, what would be the significance of termination as to them?

A My language is not as precise and you have caught it. With some if they did not hold the license in the system, if they came from outside the system and became supervisors from outside the system, it would mean termination. But if they were originally teachers in the system or Assistant Principals or whatever, they would be demoted.

Q They would be demoted below the rank of supervisor, is that correct?

A Below the rank of whatever the supervisory position they had, yes. If they were Principals, they would be demoted to Assistant Principals. If they were Assistant Principals they would be demoted to teachers.

Q Most of the people who would be excessed are not Principals, they are in the Assistant Principal category?

A Yes.

Q Is there a substantial salary difference between a teacher and an Assistant Principal? How much is it?

A From the top of the grades, $4 or $5,000?

Q $4 or 5,000?

A Yes.

Q These are licensed people, they would lose the opportunity to apply for on-the-job evaluations, is that not correct?

A That is right.

Q They couldn't be evaluated while they were occupying positions as teachers?

A That is right.

Q Even assuming your automatic appointment rule were adopted, would everybody now serving in an acting position be automatically appointed?

A No, as I --

Q Upon receipt of a license?

A The group that would not be covered would be the acting unlicensed supervisors. Those who had not taken the on-the-jobs, or who had failed the on-the-jobs.

Q I think I said it, would everybody be appointed automatically upon acquisition of a license under the interim plan or might there be some people whose appointments might not go through?

A The only ones who would not go through are those who, at the time of licensure, were not serving in a budgeted position, if their position had been eliminated before they were licensed.

Q That group would then swell the ranks of this 13 who would stand to be terminated rather than inter-district excessed under your plan?

A From what I understand from our survey that we did up to July 30, it might bring it up to between 15 and 16. From 13 to 15 or 16. There were two or three people in that position.

Q Haven't you some reason to believe that some community school boards may challenge the silence of people and try to prevent them from being automatically appointed?

A Let me tell you, it's very interesting. Now, one or two would and the reason is because unfortunately some of us read the original order of Judge Mansfield so

carefully. The vast majority, if not all, of the school boards, were under the impression that with licensure would come automatic appointment. Practically none, including our own Central Board, understood, until it was pointed out to them, that there was specific action needed on their part to change assignment to appointment. Really what I am asking for by automatic appointment is to keep people back to their original state of mind.

Q The fact is that under your plan a certain number of people would be demoted to lower positions paying less money and of significantly different character?

A Yes, those not licensed. The CSA plan would cover this group.

Q Is it clear that all those people would find positions as teachers?

A Yes. We have 7,500 teachers each year leave our system one way or another, either permanently or temporarily. You must remember, Miss Silver, that we have a regulation that if by a certain date of August you don't report to us, you are not allowed to excess for the rest of the coming year. So that we would be able to place that 13 or 16, whatever the case may be, of teachers if we came to that situation. We have 7,500 people leaving the teaching area each year and between 200 and 225 leaving the supervisory area each year.

Q In previous statements the counsel for the CSA and, I believe, you yourself earlier in this whole dispute, indicated that for a very substantial number of years no one in the supervisory service had ever been demoted in the city system, is that true? This would be quite unprecedented?

A That is how 110 got the reputation of being the Hilton.

Q This would be quite unprecedented?

A That is right.

Q At least 50 percent of the people affected would be members of the plaintiffs' class, is that correct?

A Yes.

Q I have one more question to ask about your comment of the financial implications of the injunction that Judge Tyler suggested.

As I understand it, if the injunction were continued just as it was issued before, there would be an injunction against action to fill existing vacancies and there would be an injunction against any interdistrict excessing.

A That is right.

Q Wouldn't the net effect of that injunction during its continuance as contrasted with immediate activation of your plan be to keep 28 people on the payroll or perhaps,

from your plans, be demoted?

A The reason is because something the CSA won in its negotiations with the Board and that is the payment of interim acting supervisors who have served five months and a day and to pay them retroactively. The interim acting are people who are not properly assigned. A principal suddenly becomes ill or dies, and so on, unexpectedly, and you need someone immediately to fill that position. So you don't advertise for 30 days because there is an immediate need and you just place someone in that position. We call that person the interim acting supervisor as distinguished from the acting supervisor.

Mr. Rebell pointed out very well that sometimes the circular 30 process can take a long time because a community school board is an unpaid school board, it has other problems at its meeting and the process can continue sometimes three, four, five, six months or it can happen that you think that the supervisor is only going to be out termporarily and after four months you find out that the supervisor is going to be out permanently so the circular 30 process doesn't begin.

So that, in effect, all those vacancies that we declare true vacancies because they haven't been filled properly in many cases, they are filled by interim acting

supervisors who, if they stay there five months and a day, we are going to be forced to pay them retroactively supervisor's salary even though they are not de jure supervisors.

Q In effect, you are saying that the vacancies in the community districts are at least temporarily being filled by people selected --

A In civil service language they are being filled provisionally and if they are provisionally filled five months and a day, we have to pay retroactively the supervisor's salary. So that we do lose the money.

THE COURT. You both have succeeded in confusing me now. I would guess I would have to address this to you, Miss Silver.

Was the thrust of your question going to how much it would cost the City if we continued in effect the present injunction?

MISS SILVER: That is right.

THE COURT: I somehow rather feel that that got lost in all of this colloquy between you and Mr. Arricale.

MISS SILVER: I felt the same thing and was about to quite while I was ahead.

THE WITNESS: We are not saving money because there are people who are serving in those positions on an interim basis and if this injunction were to continue, we

would arrive at the five months and a day and we then would have to pay them retroactively to September.

Q At a higher level than the level at which they are now being paid?

A At the supervisor's pay. We are not saving money.

Q I wondered if you would be losing money.

A Yes, we would. We would be paying the supervisor who was not supervising, whom I have frozen in a position, and I would be paying an interim supervisor.

THE COURT: Let me ask you this --

THE WITNESS: Was that clear, your Honor?

THE COURT: I think it is, but let me attack it this way -- well, really, that is not a fair comment. I ought to go on to another subject which you also mentioned earlier.

Take people who are now acting supervisors, is there any reason why if there is a person who doesn't have his license, doesn't have an appointment, couldn't he be immediately put in a vacancy where it occurs? Is there any legal reason or practical reason why that wouldn't happen?

THE WITNESS: Not really. The practical reason, of course -- yes, your Honor. The great problem Mr. Rebell has in taking interdistrict excessing, that would be

exacerbated by the fact that this person was unlicensed. The argument we use is that once a person is licensed, he has been centrally stamped. The unlicensed person has not been so centrally stamped. He has only been chosen by a particular community district. Once he gets centrally stamped he is really licensed for the entire system and, therefore, interchangeable.

THE COURT: The next question: Assume as one of these persons is licensed there certainly is no reason why he couldn't fill a post?

THE WITNESS: Absolutely. That is why we want them to be appointed automatically.

THE COURT: That is what you were really saying a moment ago, that upon license then you want them being appointed automatically and that excessing seniority would begin as of then?

THE WITNESS: Right.

THE COURT: Anybody else?

MR. REBELL: First, your Honor, I have a question of the Court. There were five different issues that have emerged from Mr. Arricale's testimony.

THE COURT: I agree with you.

MR. REBELL: If we are going to pursue each of them, there are a number of questions I want to ask. If we

are only concerned with the administrative difficulties of the continuing injunction, I would limit my few questions to that.

THE COURT: Let me put a question to you: Time is running on and I am in the midst of a protracted trial and I have been on the bench since very early this morning and my mental processes are, for that reason alone, beginning to get a little fudgy. The same is true, I surmise, of the court reporter, who has been here all day too.

Let me put it to you this way: Did you hear what I posed to Mr. Arricale a moment ago, the scheme I proposed?

MR. REBELL: The second one is the ore you are referring to?

THE COURT: Yes, correct.

What do you think of that from your client's view?

MR. REBELL: As a final solution for the entire problem?

THE COURT: No, because I would still like to see what the state's highest court would do. But let's put in an interim solution until the state's high court speaks, meaning by that, everybody can come back here and say, "Look,

Judge, we have to do something different."

MR. REBELL: I would really want to check back with my clients, but offhand my immediate reaction is that it solves a part of the problem but leaves a very significant part of the problem remaining.

THE COURT: What is that?

MR. REBELL: Our major concern is that by forcing unwanted people from another district into an existing vacancy you have interfered with the rights of the person being forced to take that and with the local community that is being forced to take him. From both vantage points it's inconsistent with the performing licensing scheme.

In other words, the person in District A has gotten, say, an acting appointment or licensing because he has related to the needs and the criteria and the priorities of that area. Now he is being forced to another area where his career is going to depend upon the decisions of people who may have different criteria and need and may not want to choose him.

THE COURT: It comes down to this: something has got to give somewhere. You can't give everybody a choice.

MR. REBELL: If we are going to argue the

solutions I would like to argue the proposal I put in my letter which with some clarifications makes a lot more equitable distribution of the situation for everyone.

THE WITNESS: Can I just respond to that, your Honor?

THE COURT: I don't seem to have that. That is your letter of September 30?

MR. REBELL: Yes, sir. I think this is somewhat along the lines of the proposal you were first mentioning to Mr. Arricale. Basically what I was suggesting was that all people who are excessed from a district be placed in this pool of available personnel. The key fact upon which this is based is, as Mr. Arricale has just repeated not 30 minutes ago, numerous additions are opening up all the time during the year. In fact, this was our experience in 1972 when we got an injunction, a year-long injunction, in the state law case that by the end of the year when the injunction expired everybody had been placed, a good number of them back in their own districts.

We are surmising here in their own districts there are going to be vacancies opening up during the year. In the meantime if you have to put them in positions and save the money to the city, which I agree is a consideration, put them in on the interim acting basis. Let them do the

work and get the salary but their status and career direction is with their home district and they are not interfering with the rights of the district that has been forced to take them. I think this is a much sounder basis for a compromise, and it is a compromise from our point of view.

My clients initially don't want to have these people from other areas coming in even for an interim basis.

THE COURT: I get your point. Mr. Arricale is going to burst a gut if he doesn't respond.

THE WITNESS: First of all, there is the supposition that there will be openings in the home districts. That was before the second Dred Scott decision. The birth-rates have been falling in many of the districts, for example, take District 7 in the South Bronx. Because of urban renewal and the model cities program, and new housing, they will never have the positions they had because they are never going to get the number of children back again.

Second, what you would be doing here is creating more dislocation, that is, you would want these people to be serving as interim actings and then be bouncing back whenever the final person was chosen.

Third, you would be asking in the Central Board to have all the obligations for district excessees and none of the rights over these people.

Fourth, you are neglecting the fact that licensure is not being done district by district. Each district does not license. Licensure is a centrally operated machinery and that licensure gives you, if it means anything at all, it means that you have the license to teach in the New York City school system and as the Commissioner of Education pointed out, the Central School Board is the ultimate employer of all people in the system.

So that Mr. Rebell's point is to give the Central Board all the obligations and none of the rights.

Secondly, it would cause constant dislocation, people bouncing back and forth and then in the interim, to be paid for doing nothing. Whereas what we are asking for is to have the person put in a vacancy.

MISS SILVER: May I be heard briefly?

THE COURT: Before you are, Miss Silver, is there anybody else who wants to ask any questions of Mr. Arricale?

MR. GREENWALD: I wanted to ask some questions of Mr. Arricale but if I may burden the Court for a moment, Mr. Rebell has really --

THE COURT: Let's not, Mr. Greenwald. I asked you please. I want to get Mr. Arricale finished because time is going on and I am really getting at the end of my rope

here. Really all we have done this afternoon is going right back to the hardened positions and then nobody agrees on anything which, I am sad to say, and I don't blame any of you, of course, for this, but it's inevitable and we get nowhere.

MR. GREENWALD: I was about to suggest to the Court that your suggestion with the pool might be acceptable.

THE COURT: I will hear you on that. I want to finish with Mr. Arricale.

CROSS-EXAMINATION

BY MR. GREENWALD:

Q Mr. Arricale, are you saying when you talked about the cost of maintaining a supervisor in one district with a resulting vacancy in another district, that those are costs that will ultimately reflect in a deficit or a credit to any particular district?

What I am saying, isn't it a fact that you have to take into account accruals before you know whether a supervisor kept in a district where there is no vacancy will really result in a cost to that district?

A Not really, because the way we are forcing districts to stay in the black, it becomes a question that you have eliminated the Assistant Principal because you think that that Assistant Principalship is less important

than two teachers, let's say two bilingual teachers that you now need.

Q But you presently are meeting with school boards to work out a formula to determine where the cost, if any, shall be borne, isn't that correct?

A No. Each community school board makes its own determinations according to its own priorities on how the educational moneys shall be spent, whether there shall be five bilingual teachers and one Assistant Principal or seven bilinguals and no assistant.

Q I understand that. As far as the present stay is concerned prohibiting inter-district transfer, you are meeting with school boards to determine what part, if any, of the financial costs --

A No. We have just put a hard and fast ban and that is why I explained to the Judge before, it's really a contradiction because Dr. Gifford, the Deputy Chancellor, is telling them to stay within their budget and I am telling them that they can't take a step that would help them to stay within the budget.

Q Under the CSA plan the 13 unlicensed supervisors would be covered and would be given excessing?

A That is right.

Q The CSA will cover any supervisor who served

five months over licensed, licensed appointed, or licensed appointed and tenure?

A That is right.

Q The only class not covered by the CSA plan would be the interim acting supervisor?

A Right. He is not really a supervisor.

MR. GREENWALD: No further questions.

THE COURT: Does anybody else want to question Mr. Arricale?

MR. REBELL: To reiterate, if I can understand what the Court is going to do on the basis of Mr. Arricale, I can state that there are no questions or I might ask some questions.

THE COURT: I haven't made up my mind to do anything. I don't know how to answer you. I really don't.

If you want to ask him any questions, I suggest you do.

CROSS-EXAMINATION

BY MR. REBELL:

Q Mr. Arricale, you mentioned at the beginning of your comments earlier that the excessing fund as it now exists is substantially strained. But do you have any more exact knowledge of exactly how much money is left in that fund and how much has been expended for excess supervisors

as against teachers to date?

A I don't have the exact figures but I do know because of the attendance teachers situation that Dr. Gifford, our Deputy Chancellor in charge of management and finance, did tell us that it's been strained as it's never been strained before and this was not this, but in the context of something else. It wasn't really directed to this problem but I know we are coming to the bare bones there and you also know that the City Council has severely slashed Central Board's budget more severely than in past years.

Q Go ahead.

A The other reason that this central fund has been strained has been two decisions, the Reilly Peid decision, the state decision that required the Central Board -- special education is under the control of the Central Board and emotionally and physically handicapped were required now to be taken in by the Board of Education and so we had to find funds to take care of this new group of people and the Aspira consent decree has also demanded that we now have bilingual education and the correlary of that is not just bilingual in Spanish as the Aspira case demanded, but also in French, Italian, Greek, Mandarin, and Cantonese.

Q The short answer I was looking for was whether you had exact figures or not. Apparently you don't.

THE COURT: Mr. Rebell, may I make a suggestion which might shorten things here? I don't really wish to cut you off at all, but I think you can ask Mr. Arricale these things on your own time. From what I hear I think I am going to take a rather desperate measure. Nobody really is willing to do anything except come back to where we all were in the papers. Except you were all in agreement with one exception, namely, the Central Board at my suggestion that maybe we continue the present order until the Court of this state passes on the state court aspects of this excessing issue.

I think from what has been heard here and certain work that my law clerk, Mr. Patterson, and I have been scratching out, and will scratch on, we might come up to a proposal that will fit all your interests which are really serious and not frivolous. I propose that we adjourn this hearing for a week and in the meantime I will try to get to you a draft proposal so you can reflect on it a bit. It's one of these situations, and believe me, I am not blaming you individually in any sense at all. This is, in my opinion, one of the worst most troublesome issues in modern times, this excessing problem, Title 7 cases, cases like this one, so on and so on and so on. I am afraid the legal profession has handsomely painted itself over a corner

here but I hope not. Believe me, I am not trying to be frivolous or to condemn any of you.

I am troubled by this and I think it would be worth it. Therefore, knowing that, would you just as soon desist until I can come up with a proposal for all of you to look at?

MR. REBELL: Yes, sir, I think that makes eminent sense.

MR. BERNIKOW: May I ask Mr. Arricale to comment about his position on your second proposal that Mr. Rebell--

THE COURT: He told me what he thought of it.

MR. BERNIKOW: I want to be sure you got that.

THE WITNESS: I thought it was very good.

THE COURT: I am not sure others do, right, Mr. Greenwald?

CSA wouldn't think much of my idea, would they?

MR. GREINWALD: A pool with no bumping, your Honor?

THE COURT: The second idea, in other words, that we go ahead, lift the injunction and we will allow inter-district excessing so long as nobody is bumped with a special proviso to take care of the problem that Mr. Arricale adverted to, namely these specialties where there is a declining market for their professional skills just because

of the way education is going and that we would probably have to put a safety valve in any order to allow evaluation of those cases on a case-by-case basis, assuming that Mr. Arricale is correct when the most that would ever come up would be ten in number.

MR. GREENWALD: I believe CSA would be quite amenable to a procedure like that. As long as we understand that we are talking about all supervisors, licensed, unappointed, licensed and appointed. We are looking to protect every supervisor whether he has gone through the rig-a-majig of appointment or not. But something like that would be down our alley.

THE COURT: Let's say no more. Let's get something in draft. It isn't that long in outline. We won't make it as fancy as you could.

MR. GREENWALD: And a case-by-case solution of the exotic cases is needed, because there can be swaps, changes and interplay.

MR. REBELL: Your Honor, 30 more seconds. I want to clarify that this issue of automatic appointments that the defendants have mentioned one way or another is a serious issue and I think that is one we would like an opportunity to argue before you.

THE COURT: I don't deny that. I merely said

Remember I said something earlier. I think it was in response to your question or somebody sensibly asked, when I was putting forth proposals here, was I thinking in terms of a proposal which would be an order forever and forever. The answer to that is no, particularly because of my concern and my anxiety to see or hear what the highest court of our state would do with this issue from the state law viewpoint.

Second, I am going to put a proposal before you, in any event, in draft, so this, among other things, would certainly be on your mind, I assume, when you have scrutinized our proposal.

MR. REBELL: Fine.

THE COURT: Is that all right with you, Miss Silver?

MISS SILVER: It substantially is, your Honor. I would like to say I think the plaintiffs have always been amenable to the idea of a compromise. It's just that none has been offered by anybody.

THE COURT: All right.

MISS SILVER: May I make one comment that I hope will have some relevance to your deliberations. It has come to my attention since I submitted the last memorandum that we submitted with my suggestions for compromises in a foot-

note that strict seniority has not always been followed in the city system and the specific plan that was followed that was called to my attention seems to me extremely pertinent for your deliberations and if I may just explain it briefly.

As I understand this, the purpose of this plan I am going to explain was to keep some kind of balance of tenure in the staff. So there was a proviso that people with seniority above 25 years could not be excessed at all and as to other tenured people they were ranked in order of seniority and then the entire ranked list was divided in half and selections were made alternately from the two lists. And you understand that this plan prevailed at least as late as 1960. I checked Section 2585 of the state law to see if I was mistaken in thinking that strict seniority was required by law for any class and I think that it is apparent that in cities over 1,000,000 the superintendent has had discretion to do that kind of adjustment in seniority and I cite this because I hope your Honor, in preparing drafts will consider the possibility that whatever rule is followed will not fall entirely upon the people appointed pursuant to this Court's decrees.

THE COURT: Mr. Arricale seems to be nodding his head.

MR. ARRICALE: I know of no such practice. I

am not saying there isn't.

MR. SILVER: Do you have reason to believe it did not exist?

MR. ARRICALE: Whether or not it did, the fact of the matter is that we have contractual agreements since that time that would preclude that kind of situation.

THE COURT: Let me suggest that, again, Miss Silver, don't worry about that. If you want to press that, that is fine with me. Why don't we wait and look at this proposal and I think we can get up at least a sufficient outline for you to see its significance or lack thereof, whichever you choose. I am going to postpone this hearing until a week from today at 4:00 o'clock in this room. I am hopeful maybe we can mail to you a draft in the next several days, meaning by that almost certainly early next week.

MISS SILVER: I had certain housekeeping matters which I was going to raise but I can defer them until next Thursday, if that would be more convenient to you.

THE COURT: I would prefer unless they are of priority --

MISS SILVER: Other than to say we are struggling mightily to reach an agreement on the appointment issue and will not foreclose Mr. Rebell from commenting on our plans,

the other housekeeping matters which have to do with the interim licensing plan can probably wait one week.

THE COURT: Okay.

MR. GREENWALD: May I impose on the Court by asking an extension to 4:30? I have an Appellate Division hearing in the afternoon and I don't want to be late. I would rather get a little more time.

THE COURT: This puts a tremendous burden on the court reporters who are with me because we are really in a marathon session. We are having a highly unusual trial, believe me. I don't even want to tell you what is going on except to say that in all my years on the bench I never imagined I would ever see anything like this and I hope I never see anything like that again. It's hard for them and it's a pounding for me, because by the end of a long day it just gets very hard.

Why don't you do your best and if you are a little late we will wait for you. Don't worry about that.

MR. GREENWALD: Thank you, your Honor.

* * * * *

J 215a

Memorandum from Tyler, J., dated October 15, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHAMBERS OF
HAROLD R. TYLER, JR.
JUDGE
U. S. COURTHOUSE
NEW YORK, N. Y. 10007

October 15, 1974

MEMORANDUM

TO: COUNSEL

RE: Boston M. Chance et al. v. The Board of Examiners etc.; 70 Civ. 4141 HRT

In accordance with the suggestion of the undersigned at the last hearing on October 10, 1974, there is submitted a proposed draft of an order to resolve the excessing issue in this case.

Harold R. Tyler, Jr.
U.S.D.J.

J 216a

Proposed Draft of an Order

DRAFT
10/15/74

The order of July 30, 1974, is rescinded and a new, "final" order containing the following provisions is to be entered.

I. If a supervisory position is terminated by an appointing authority, the person holding that position will be placed in a preferred pool.

A. Supervisors whose positions have been terminated will be separated into two groups, A and B. Group A will consist of supervisors who obtained their positions under procedures which implemented court orders in this case. Group B will consist of supervisors who obtained their positions under procedures in effect before the court orders in this case.

B. Both groups will be classified by supervisory license categories.

C. A supervisor otherwise qualifying to be in preferred Group A will be excluded if:

Proposed Draft of an Order

1. he failed to take the licensing test for his position after adequate notice and during a period when he had the opportunity to take the examination (including on-the-job evaluation),

2. he has acted in the position for less than five months as of the time his position is terminated or as of the time he is to be "bumped", or

3. he has taken and failed the licensing test for his position;

unless he has passed the appropriate licensing examination or re-examination before his position is terminated or before he is to be "bumped"; or unless he has completed all steps of the appropriate examination or re-examination which are within his control, but the results have not been evaluated as of the date his position is terminated or he is to be "bumped", in which case

his status will be determined after completion of the examination or re-examination and evaluation and will relate back to the date determined in accordance with subparagraph IV. B. herein.

II. A. No person holding a supervisory license may "bump" another supervisor, whether acting or permanently appointed, if that supervisor is in either Group A or B.

B. A supervisor in neither Group A nor Group B may be "bumped" as specified in Article VII, § L of the 1972-75 contract between the C.S.A. and N.Y.C. Board of Education.

C. Vacancies in supervisory positions throughout the city shall be filled to the extent possible by supervisors in Groups A and B who hold appropriate licenses.

D. Supervisors to fill vacancies on an "acting" basis shall be selected alternately from Group A and from Group B without regard to license category. Where necessary to resolve conflicts,

relative seniority as specified in paragraph IV herein shall govern.

E. A supervisor in Groups A and B will have the right of first refusal on any vacancy in his home district for which he is licensed and which occurs before June 30, 1976. He will have the right to be appointed to the position on the same terms as other supervisors in the same, or most analogous, license category are appointed in that district.

F. Supervisors in Groups A and B who are not re-positioned in their home districts will be assigned, on an "acting" basis, to vacancies in the central district, to the extent possible, and, when not possible, to community districts. Such "acting" assignments will be temporary unless an agreement for appointment is reached between the assigned supervisor and the appointing authority.

G. If an "acting" supervisor in Group A or B is displaced by a permanent appointee pursuant to paragraph III herein, he will

be returned to preferred Group A or B for reassignment.

III. A. Advertising to fill vacancies in supervisory licenses held by any supervisor in Group A or B is enjoined except that the equivalent of Circular 30 advertising is mandated to all appropriately licensed supervisors in Groups A and B.

B. The appointing authorities will screen applicants for permanent positions from Groups A and B first. If no supervisor meeting the appointing authority's requirements is found among Groups A and B, advertising to fill the vacancy will proceed as specified in subparagraph III.C. infra.

C. Circular 30 advertising is mandated for all vacancies for which no supervisor in Group A or B holds the appropriate license and for all other vacancies once the appointing authority has complied with subparagraphs III. A. and B., supra.

IV. A. Relative seniority of supervisors in Group B shall be determined in accordance with contract provisions.

Proposed Draft of an Order

B. Relative seniority of supervisors in Group A shall be determined under the same rules applicable to Group B. For purposes of this determination, the date of appointment will be determined after the supervisor has passed the appropriate examination or re-examination and shall relate back to the date on which the supervisor completed all aspects of the examination or re-examination which were within his power to complete.

C. For all purposes of this order, a supervisor in Group A shall be deemed to have been appointed to the position in which he is acting as of the date specified in subparagraph IV. B. herein.

V. A. This order shall not apply to vacancies in positions requiring the uncommon, specialty licenses listed below.

1.

2.

3.

4.

Proposed Draft of an Order

B. Any employment dislocations arising from the discontinuance of positions requiring these licenses shall be referred to this court for individual disposition.

VI. This order shall remain in effect

A. until all supervisors in Groups A and B have once been permanently appointed or have voluntarily and in writing withdrawn from the preferred pool, or

B. until three years from the date of this order has elapsed,

whichever first occurs.

J 223a

Letter dated October 17, 1974, from Leonard Greenwald to Tyler, J.

LAW OFFICES

FRANKLE & GREENWALD

MAX H. FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011

(212) 242-0200

October 17, 1974

Hon. Harold B. Tyler, Jr.
Judge, United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
Index No. 70 Civ. 4141

Dear Judge Tyler:

The CSA has reviewed the proposed draft of an order submitted to counsel for all parties by the Court on October 15, 1974.

Using that proposed draft as a base, the CSA has prepared an alternate plan and provisions, copy of which is respectfully attached hereto.

As will be evident, the CSA proposal contains provisions not contained in the proposed draft. Among these provisions are the following:

a) The Executive Director for Personnel is given the primary responsibility for effectuating the Court order.

b) The proposed order requires the community boards and the central board to supply certain information to the Executive Director for Personnel. Such information is necessary in order to determine whether in fact the order is being appropriately applied.

c) Under the CSA draft, supervisors in preferred Group A, though assigned to other appointing authorities, retain the right during the life of the order to return to their original appointing authority at any time a vacancy occurs.

We respectfully suggest that the CSA's order will prevent further unwarranted traumatic incursions upon the city school system.

Respectfully yours,

/s/
LEONARD GREENWALD

LG:bsw
cc: Saul Z. Cohen, Esq.
Jeanne R. Silver, Esq.
Michael Rebell, Esq.
Leonard Bernikow, Esq.

COPY

Draft Proposal of Council of Supervisors and Administrators Pertaining to Citywide Excessing Plan

DRAFT PROPOSAL OF COUNCIL OF SUPERVISORS AND ADMINISTRATORS ("CSA") PERTAINING TO CITYWIDE EXCESSING PLAN.

The order of July 30, 1974 shall be rescinded and a new final order containing the following modifications and provisions will be duly entered.

I

Within ten working days after entry of the order all Community School Boards and the Central Board of Education shall forward in writing to the Executive Director for Personnel the following information:

(a) A list of the supervisory positions to be excessed. Each excessed position shall be described as follows: by license, by location, i.e., school, Community Board or Headquarters, source of funding, or any other information deemed relevant. Failure to supply this information or any other information deemed necessary to the effectuation of the order shall be deemed to be violative of the order.

(b) Concurrent with the aforementioned list of excessed positions, the Community Board or the Central Board (appointing authorities) shall furnish the Executive Director for Personnel with a complete list containing the names and licenses of all supervisors as defined hereinafter who are currently serving in a supervisory position or by virtue of a supervisory license. This list shall contain such information as the supervisor's license and/or licenses, date of appointment and/or assignment, and such other relevant

Draft Proposal of Council of Supervisors and Administrators Pertaining to Citywide Excessing Plan

data as the Executive Director may require.

Within ten business days after the receipt of such information, the Executive Director shall advise the appointing authority of the name and licenses of the individual to be excessed.

For purposes of excessing within the appropriate district, bureau or other organizational unit, the supervisor with the latest date of appointment or assignment as defined herein shall be the first to be excessed.

Supervisors whose positions have been excessed will be for the purposes of this order categorized as Group A and Group B. Group A will consist of supervisors who have been licensed and appointed or licensed under court-imposed procedures relative to this case. Group B will consist of supervisors who were licensed, licensed and appointed or licensed, appointed and tenured under procedures in effect before the court orders in this case.

Supervisors in both categories will be classified by appropriate license or licenses as well as by last assignment area, i.e., district, headquarters, bureau, etc.

A supervisor otherwise qualified to be in Group A will be excluded from such category as well as the other operative provisions if: (1) the supervisor has failed to take the appropriate licensing examination after adequate notice and during a period when he had the opportunity to take the examination (including on the job evalua-

tion); (2) the supervisor has been assigned in an appropriate supervisory position for less than five months duration, the five months to be calculated as of the date his position has been excessed and as of the date he is subject to the bumping procedures described hereinafter; and (3) the supervisor has taken and failed the licensing examination for the position he currently serves, in unless the supervisor has passed the appropriate licensing examination or re-examination before his position is excessed, or he was subject to bumping, or unless the supervisor completed all the appropriate steps of the examination or re-examination but the results have not been evaluated as of the date his position was terminated or he was subject to the bumping procedures, in which case his status shall be determined after completion of the examination or re-examination and valuation, and his rights under this order shall thereupon relate back to the date which shall be determined in accordance with other provisions of this order.

The procedures as specified in Article VII, Section L of the collective bargaining agreement between the CSA and the New York City Board of Education shall not apply to a supervisor in Group A or B.

II

As indicated herein, upon receipt of the information concerning the type of supervisory vacancy, location, etc., the Execu-

tive Director for Personnel shall immediately assign supervisors in Group A and Group B to vacancies which correspond to their respective license area. Assignment to supervisory vacancies shall be made on the basis that the supervisor with the earliest date of appointment or assignment within license will be the first to be assigned to an appropriate vacancy, provided, however, a supervisor with an appropriate license in Group A will be the first assigned to an appropriate license vacancy within the school, district, bureau or other organizational unit in which he had previously served prior to excess. In the case of a tie among supervisors in Group A, the supervisor with the earliest date of assignment or appointment shall have priority, provided further that a supervisor in Group A who has been excessed from a school or unit in a district to another school or unit in another district may, should an appropriate vacancy occur during the operative period of this order, request an opportunity to return to the school, district or unit from which he has been excessed if a vacancy should occur in his license. Such a request shall have priority over any other transfer, assignment or appointment to that vacancy.

The Executive Director for Personnel is ordered to fill every vacancy as expeditiously as possible, utilizing those excess supervisors available in Group A and Group B. Selection by the Executive Director of Personnel of a supervisor to fill an appropriate vacancy shall be deemed by operation of this

order to be an appointment to that vacancy where such appointment is relevant.

Supervisors who are excessed pursuant to this order and its operation shall be paid at their appropriate license from the date of excessing.

Supervisors assigned by operation of this order shall suffer no diminution of right, status or license by virtue of such assignment.

Supervisors who are not assigned to vacancies will be assigned to vacancies wherever those vacancies exist with the understanding that school licensed supervisors will wherever possible be assigned to appropriate school categories and supervisors with other licenses to similarly appropriate positions. Such assignments shall be considered as temporary assignments unless and until an appropriate appointment is made of the assigned supervisor.

III

During the term of this order the appointing authority shall be prohibited from assigning or appointing individuals not currently serving in supervisory positions to vacancies in licenses while there are supervisors in Groups A or B with similar licenses

yet unassigned. The appointing authority shall be permitted where appropriate to begin and complete Circular 30 procedures in license areas not held by Class A or B supervisors. Copies of all Circular 30 procedures undertaken by the appointing authority in this instance shall be made available to the Executive Director for Personnel and the CSA.

IV

This order shall not apply to excessed positions in the following license areas:

1. All subject area supervisors.

2. Licenses applicable only to individual supervisors.

3.

4.

Any excessing arising in these license areas shall be referred to the court for individual disposition.

Any disagreement or dispute concerning the meaning, interpretation or application of this order shall be disposed of in the following manner:

(a) The parties concerned shall meet with the Executive Director for Personnel and present their positions.

(b) The Executive Director for Personnel, after reviewing the facts, shall arrive at a decision.

(c) The decision may be appealed to this Court for disposition.

This order shall remain in full force and effect until (a) supervisors have been appropriately appointed from the pool or until such time as any individual supervisor has voluntarily and in writing withdrawn from the pool, or (b) until two years from the date of this order have elapsed, whichever occurs first.

J 2318

Letter dated October 22, 1974, from Jeanne R. Silver to Tyler, J.

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

October 22, 1974

Hon. Harold R. Tyler, Jr.
United States District Judge
United States District Court
Southern District of New York
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

In accordance with your instructions of last week, I am enclosing plaintiffs' proposed redraft of the draft order on excessing which you submitted for consideration of the parties.

This redraft reflects my statement last Thursday that plaintiffs agreed with the substantive approach you had proposed, at least as we understood it. As I suggested then we had doubts regarding the feasibility of the seniority rule in para. IV.B, and I have accordingly changed it. I have also clarified the Order's duration and have explicitly made it retroactive to July 30, 1974. Finally I have attempted to introduce some clarifying language and make more explicit some of the Order's administrative details.

Plaintiffs believe the enclosed document represents a reasonable compromise of the conflicting cointentions of the parties, intervenor and amicus regarding the excessing problem. In effect, it provides that the preliminary matter of who should be excessed from the jurisdiction of an appointing authority is determined by the action of such authority in deciding what positions to abolish. Presently, as we understand it, appointing authorities can make these decisions regarding position abolition on the basis of factors independent of the character or seniority of individuals affected and solely having to do with the need for the position in the light of conditions in a

Letter dated October 22, 1974, from Jeanne R. Silver to Tyler, J.

particular office or school. By providing that the particular individual occupying a position abolished in this manner shall be the one to lose his position, the order submitted abrogates the operation of seniority rules which plaintiffs have argued would necessarily result in excessing exclusively those people appointed pursuant to this Court's Orders and especially the minorities constituting plaintiffs' class. We assumed on the basis of the Court's draft that it considered this an acceptable approach to ameliorating the discriminatory effects of traditional seniority excessing on plaintiffs' class when combined with the further provisions in that draft mitigating and equalizing the effects of such excessing on all individuals placed in the preferred pool.

It has been suggested to me by your law secretary that the Court may not have intended its proposed order to operate in the fashion I have suggested and that the sole purpose of the pool system was to provide for equitable placement of 63 persons who would be subjected to inter-district excessing under the original plan of the defendant city board. I must respectfully state that plaintiffs would object strenuously to such a limited proposal. I have endeavored to ascertain from defendant's counsel the respective number of the 63 potential excessees who were appointed before and after the preliminary injunction in this case. Although I have received no response, Mr. Bernikow tentatively corroborated my belief that this data was not included in the Board's report. In the absence of such information, plaintiffs believe it is fair to infer that close to all of the 63, having been identified on the basis of inverse seniority rules, must have been very recent appointees, placed in their positions since this Court's orders. Thus, the proposed pool plan if applied solely to replacement of members of this group, rather than selection of excessees, would not in any way mitigate the impact of excessing on post court-order assignees or the members of plaintiffs' class.

Plaintiffs believe that in contrast to this effect, a system of the character proposed in the annexed draft order would have the result of fairly equalizing the burdens of excessing as betweeen post and pre-court order personnel without causing undue disadvantage to anyone. However, in the interest of compromising this matter promptly, plaintiffs have considered certain objections of other participants in this dispute and are prepared to advise the Court of two additional modifications that would be acceptable if the basic substance of the enclosed proposed order, including its duration, were maintained:

Letter dated October 22, 1974, from Jeanne R. Silver to Tyler, J.

1. To meet objections expressed by counsel of the CSA regarding elimination of seniority as the basis for determining who shall be excessed from the jurisdiction of an appointing authority, plaintiffs would agree to adoption of the modified seniority rule suggested by the Court's proposal as the basis for such decisions. Under the rule as so applied, when an appointing authority abolished a position of a prototypical character, all persons within its jurisdiction holding such positions would be placed in the group A and group B categories, and the alternating process, following relative seniority within each group, would be used to determine who should be excessed into the city-wide pool.

2. Amicus has objected to the retroactive effect of the proposed order insofar as it allegedly would require community districts to redo any intra-district position shifts which may have been effected since July 30, 1974 leading to the defendant City Board's projected list of 63 inter-district excessees. No information is presently available on the extent, if any, to which such disruptions would occur and plaintiffs believe the appointing authorities were on notice to avoid permanent shifts and transfers. However, solely in the interest of compromise, plaintiffs would be willing to accept as a further condition to its proposal that for this year only, any instances of serious disruption of legally adopted intra-district staffing patterns entailed by its operation which could not be resolved by agreement of the parties hereto with affected personnel and appointing authorities, would be presented to this Court for separate determination.

I am authorized to state that if the second compromise were incorporated, counsel for the Community School Board Association amicus would join in supporting the plaintiffs' proposed order. Amicus would also not object to the seniority rule I have described in the paragraph numbered 1 above, if it were operative only with respect to position abolitions occuring after the date the order was entered.

cc: Adrian P. Burke, Esq.
Samuel Z. Cohen, Esq.
Leonard Greenwald, Esq.
Michael Rebell, Esq.

Sincerely,

/s/
Jeanne R. Silver
Attorney for Plaintiffs

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,	:	
Plaintiffs,	:	70 Civ. 4141
-against	:	
THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,	:	ORDER
Defendants.	:	

Plaintiffs and defendant Board of Education having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented:

IT IS HEREBY ORDERED:

This Court's Order of July 30, 1974 is rescinded and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system.

I. If a supervisory position has been or is abolished by an appointing authority effective September, 1974 or at any time between July 30, 1974 and October 31, 1977, the supervisor affected by such abolition or dislocation will be placed in a preferred pool.

A. Supervisors in the preferred pool will be separated into two groups A and B. Group A will consist of those in the pool who obtained their positions after the preliminary injunction of September 17, 1971 issued in this case. Group B will consist of supervisors who obtained their positions prior to the preliminary injunction of September 17, 1971.

B. Supervisors in each of groups A and B will be classified as eligible to fill supervisory vacancies on the basis of the supervisory license appropriate for the position each was holding at the time his position was abolished

C. An unlicensed supervisor otherwise qualified to be in the preferred pool, group A will be excluded from the pool if:

1. he failed to take the licensing test for his position after adequate notice and during a period when he had the opportunity to take the examination (including on-the-job evaluation),

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

2. he has acted in the position for less than five months as of the time his position is abolished or as of a time he is to be displaced or "bumped" therefrom,

2. he has taken and failed a licensing test for his position; unless he passed an appropriate licensing examination or re-examination before his position was abolished or before he is to be dislocated therefrom or unless he has completed all steps of the appropriate examination or re-examination which are within his control, but the results have not been evaluated as of the date his position is abolished or he is to be dislocated, in which case his status will be determined after completion of the examination or re-examination and evaluation and will relate back to the date determined in accordance with subparagraph IV.B. herein.

D. Notwithstanding the provisions of Art. VII Sec. L of the 1972-75 contract between the CSA and New York City Board of Education or any existing regulations of the New York City Board of Education no person eligible for placement in the preferred pool in either group A or group B shall be displaced from his post as a result of the abolition of a position occupied by another individual.

E. When an appointing authority abolishes a position, it may terminate the services of a supervisor holding a position of the same title within its jurisdiction who is unqualified to be in the preferred pool for one of the reasons set forth in subparagraph C above, provided that the supervisor whose position is abolished is placed in the resulting vacancy.

J 237a

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

II. Except where inconsistent with the provisions of this Order, vacancies in supervisory positions throughout the city shall be filled to the extent possible and in the manner set forth in this paragraph by supervisors in the preferred pool, groups A and B, who are determined to be eligible therefor under the classifications established pursuant to para. I.B of this Order:

A. Supervisors in the preferred pool will have the right of first refusal to appropriate vacancies opening up in their home districts which occur within 2 years from the date they are excessed or before October 31, 1977 whichever is earlier. Where more than one supervisor in the pool is eligible for return rights to a particular vacancy, selection shall be made alternately from among eligible individuals in groups A and B respectively and, within each group, in inverse order of relative seniority determined in accordance with the provisions of para. IV.A and B hereof.

B. Advertising to fill vacancies in supervisory positions for which one or more supervisors in the preferred pool has been classified as eligible shall be enjoined pending the completion of procedures provided below for affording such eligibles the opportunity to fill such vacancies.

1. Before a vacancy is generally advertised, eligible individuals in the preferred pool shall be given 7 days notice by registered mail of their opportunity to apply.

2. All eligible individuals in the preferred pool shall be screened and considered by the appointing authority for such positions in

accordance with provisions of Spec. Circ. 30, 1972-73, as amended and any rules or regulations of the appointing authority governing assignments pursuant to Spec. Circ. 30, provided that no such rule or regulation shall be deemed to require personal interviews of more than one third of the applicants for any vacancy.

3. If no supervisor from among eligible applicants from the preferred pool, is selected by the appointing authority on the basis of appropriate selection procedures, advertising to fill the vacancy shall proceed as specified in subparagraph III.B.4 infra.

4. Cir. 30 advertising is mandated for all vacancies for which no supervisor in the preferred pool is eligible and for all other vacancies once the appointing authority has complied with subparagraphs II.B, 1, 2 and 3 above.

III. The City Board of Education and/or the Chancellor shall provide to the extent possible for assignment of individuals in the preferred pool to fill vacancies on a temporary basis in accordance with the following provisions and under the following conditions:

A. Temporary assignments shall be made to vacancies under the jurisdiction of the City Board and/or Chancellor to the extent possible and only when not possible to community districts.

B. The order of temporary appointment to appropriate vacancies shall be determined by selecting supervisors alternately from Group A and Group B. provided that if in a particular instance no person in the group from which the next vacancy is scheduled to be filled has a

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

suitable license or eligibility qualification, such vacancy shall be filled by an available and eligible person in the alternate group. Within each group and license category selections shall be made according to seniority as determined pursuant to para. IV. infra.

C. Assignments pursuant to this paragraph will remain temporary unless or until an agreement for appointment is reached between the assigned supervisor and the appointing authority in consultation with its superintendent and any parent or other advisory groups established pursuant to Spec. Circ. 30 and/or rules of the City Board of Education respecting selection of supervisors pursuant to this Court's orders.

D. If a temporary assignee placed pursuant to para. III. A hereof is displaced by an individual appointed or assigned pursuant to para. II or para. II. B hereof, he shall be reassigned at the earliest possible date in accordance with procedures set forth above.

E. A temporary assignee shall retain all rights of other persons in the preferred pool during the duration of his temporary assignment.

IV. A. Relative seniority of supervisors in Group B shall be determined in accordance with contract provisions.

B. Relative seniority of supervisors in Group A shall be determined under the same rules applicable to Group B. For purposes of this determination, the date of an individual's assignment to the position occupied shall be considered the appointment date.

V. A. This Order shall not apply to vacancies in positions requiring the uncommon, specialty licenses listed below.

1.

2.

Plaintiffs' Proposed Redraft of the Draft Order on Excessing

3.

4.

B. Any employment dislocations arising from the discontinuance of positions requiring these licenses shall be referred to this Court for individual disposition.

VI. This Order shall remain in effect until October 30, 1977.

Dated:

Harold R. Tyler
United States District Judge

J 2418

Letter dated October 22, 1974, from Leonard Bernikow to Tyler, J.

The City of New York

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

ADRIAN P. BURKE, *Corporation Counsel*

October 22, 1974

Hon. Harold R. Tyler, Jr.
Judge, United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Boston M. Chance et al. v.
Board of Examiners et al.
70 Civ. 4141

Dear Judge Tyler:

The proposal of the CSA, submitted to your Honor on October 17, 1974, is acceptable to the Board of Education with one modification. The Board of Education prefers that excessed personnel be placed directly and permanently into vacancies and not that they displace the less senior supervisors who would then be placed in vacancies.

The direct placement into vacancies as recommended in your Honor's draft is preferable to "musical chairs" since there are always sufficient vacancies in the year's period to place any excessed supervisors.

In principle, the Board is opposed to two groups or two listings. However, if one were to interpret Group A and Group B as the CSA proposal does, the Division of Personnel would have to admit that in such a context no administrative problems are presented.

In short, we must urge that the Division of Personnel have the power to place excessed supervisors in appropriate vacancies permanently or excessing rights will be meaningless even within the same district.

Letter dated October 22, 1974, from Leonard Bernikow to Tyler, J.

If there is no obligation for a district or a school to accept an excessed person into an existing appropriate vacancy, then excessing rights have been made meaningless and have been destroyed.

Respectfully yours,

Leonard Bernikow
Assistant Corporation
Counsel

cc: Leonard Greenwald, Esq.
Jeanne R. Silver, Esq.
Saul Z. Cohen, Esq.
Michael Rebell, Esq.

J 243a

Letter dated November 1, 1974, from Leonard Bernikow to Tyler, J.

The City of New York

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

ADRIAN P. BURKE, Corporation Counsel

November 1, 1974

Hon. Harold R. Tyler, Jr.
Judge, United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Boston M. Chance et al. v.
Board of Examiners et al.
70 Civ. 4141

Dear Judge Tyler:

Mr. Arricale has asked me to submit his letter to me, dated October 31, 1974. Accordingly, I am enclosing a copy of that letter for your consideration.

Respectfully yours,

/s/

Leonard Bernikow
Assistant Corporation
Counsel

Enclosure

cc: Leonard Greenwald, Esq.
Jeanne R. Silver, Esq.
Saul Z. Cohen, Esq.
Michael Rebell, Esq.

J 2448

Letter dated October 31, 1974, from Frank C. Arricale

THE BOARD OF EDUCATION
OF THE CITY SCHOOL DISTRICT OF NEW YORK
DIVISION OF PERSONNEL
65 COURT STREET
BROOKLYN, N.Y. 11201

FRANK C. ARRICALE, II
EXECUTIVE DIRECTOR

October 31, 1974

596-6121/22/23

Mr. Leonard Bernikow
Corporation Counsel
Municipal Building
New York, New York

Dear Mr. Bernikow:

It is impossible to be just slightly pregnant. The root issue remains: Does a supervisor whose position has been eliminated because of budget constraints or population shifts get demoted forthwith or does that supervisor get placed permanently in another com able vacancy within the System?

No preferred list or excess pool can get around the question. If these preferred lists or excess pools are made up of supervisors who must be placed somewhere in the System, then there is meaning to the elaborate details on how these lists or pools will be utilized; however, if there be no obligation to place these excessed supervisors as plaintiff's system suggests, then lists or pools have no meaning. In fact there would be no obligation to grant people on these lists or in these pools even an interview for vacant positions. We cannot avoid the question. Excessed supervisors either have rights to be placed in vacancies or they get demoted.

Judge Tyler's plan seems to describe how excessing could be administered in an equitable manner. I believe he has eliminated disruption by having the person whose position was eliminated be excessed rather than have the most junior person excessed. His plan also eliminates from the post-Mansfield supervisors group undue burdens of excessing. However, if there is no obligation to place pre or post Mansfield supervisors in existing vacancies, then all supervisors share equally the devastation of being demoted when a position must be eliminated from a budget. Not only are the tenure rights of the older supervisors destroyed, but the gains of the new supervisors in the System will have been made meaningless.

The so called "middle way" by which persons in the excess pool continue to be paid as they serve only temporarily and periodically in vacancies until permanent supervisors are chose, is at once financially wasteful as it is disruptive. At the same time the plaintiff's proposal refuses to answer the question: Does an excessed supervisor have rights to be permanently placed in comparable vacancies?

The lawyer for amicus wants this "Floating pool" to be paid by some Central fund ad infinitum. Does he think that ultimately the districts would not have to pay for these supervisors? There is no additional source of revenue for Central. We all go to the same limited tax supported allocation for money.

J 245a

Letter dated October 31, 1974, from Frank C. Arricale

Mr. Leonard Bernikow -2- October 13, 1974
Corporation Counsel

In short, please let me urge you that a definitive answer must be given to the question of whether or not supervisors have excessing rights. Any attempts to evade or cover or mitigate the impact of an answer to this question will create unending administrative chaos. I have already indicated to you that a negative answer to such a question will be devastating to the morale, stability, and efficiency of a System which must as far as possible be protected from sectarian politics. The plaintiff's proposal, joined in by amicus with or without the amendments, negates excessing rights or evades the issue by meaningless procedures. All procedures are meaningless if there is no obligation to place or accept excess supervisors.

With every best wish.

Sincerely,

FRANK C. ARRICALE, II
Executive Director

FCA:es
cc: Mr. James Stein

Transcript of Proceedings dated November 8, 1974

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FRANKLE & GREENWALD

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al, Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al Defendants.	70 Civ. 4141

Before:

HON. HAROLD R. TYLER, JR.,

District Judge

November 8, 1974
4:00 p.m.

APPEARANCES

ELIZABETH B. DuBOIS, ESQ.
JEANNE R. SILVER, ESQ.,
Attorneys for Plaintiffs

ADRIAN P. BURKE, ESQ.,
Corporation Counsel, City of New York,
Attorney for Defendant Board of Education
BY: LEONARD BERNIKOW, ESQ.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, ESQS.,
Attorneys for Defendant Board of Examiners
BY: HOWARD A. JACOBSON, ESQ., of Counsel

FRANKLE & GREENWALD, ESQS.,
Attorneys for Council of Supervisors and Administrators
BY: LEONARD GREENWALD, ESQ., of Counsel

MICHAEL A. REBELL, ESQ.
Attorney for New York City School Board Association, Amicus Curaie

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THE COURT: Are we missing anyone?

MR. BERNIKOW: Mr. Rebell is not her

THE COURT: It is a few minutes bef four. We will wait.

(Pause)

MR. DuBOIS: Your Honor, Mr. Rebell is here.

THE COURT: If we could take up first the latest proposal by this Court to try and resolve the existing issue. As you know, since our last hearing on this subject which I believe was on October 10, there has been some delay due to the fact that I have been involved in another long trial, but during the period we were able to come up with another proposal. You were telephoned yesterday by Mr. Patterson and I understand that you all were good enough to come over and pick up a cop yesterday afternoon of the latest proposal by the Court.

I think you will understand that this latest proposal is predicated on a number of considerations which have come out, I believe, in the hearings, but perhaps above all they are designed to reflect what I think is a very important consideration, to wit, that this Court is not

empowered to be passing on state law willy-nilly or applying state law.

This Court is more concerned and as I see it can only be concerned with entering orders which are designed to protect the basic orders in this case, which in turn are designed to protect the plaintiff class. This is another way of saying that this Court can only be concerned, it seems to me, with vindicating federal law principles, and that is about all this Court can be concerned about, as I see it.

Turning to a somewhat different dimension, I believe that this order is purposely designed to leave control in the hands of a citywide agency or official. I think that is important to vindicate the federal law principles involved here as they protect the plaintiff case, but my understanding of New York State law is such that I believe it accords with New York law in that regard too.

Now, do the plaintiffs feel agrieved by my latest proposal, Mrs. Silver?

MRS. SILVER: No, your Honor, we do not. We feel that if we understand it correctly -- I think we do in view of what your Honor just said -- as essentially maintaining current rules in effect except as explicitly modified by the proportional formula established in this document, we consider it acceptable.

We have a couple of I think very modest language changes. We do not understand the bumping provision of III at the top of page 3 and we have drafted and we can show your Honor a suggested reporting provision to be added as VII. Specifically, the language changes would be in I(a).

THE COURT: Wait a minute now.

MRS. SILVER: For clarification.

THE COURT: You are going back to page 1?

MRS. SILVER: Yes. I am sorry. I do not mean to backtrack.

THE COURT: All right.

MRS. SILVER: In I(a), at the second sentence, after the word "position," simply for clarification, we would add "whether on an acting or regular basis." We think that is already implicit in the order. The second line of I(a).

THE COURT: Yes. Might I just say, "whether regular or acting."

MRS. SILVER: Fine.

THE COURT: All right. Does that lead us over then to page 3?

MRS. SILVER: No, your Honor. I have one suggested addition on page 2.

THE COURT: All right.

MRS. SILVER: This would come in I(c)(d), the first

line. The purpose here, your Honor, is to make clear again something we think is implicit, that an individual who has served more than five months but has not been able to be examined solely because of delays, which will be the subject of later discussion today, which have prevented any examination from being given, such an individual should not be excluded from your system.

Now, we think that the order is intended to cover such people but it doesn't in its present language seem to apply to such individuals, the provision of I(c), for dating back seniority to assignment, because I(c) only deals with people who have been licensed.

So we would recommend the following addition: "If a person occupying a supervisory position has not had an opportunity to be examined although he has served for more than five months and is eligible," and then continue with the sentence as it currently reads.

THE COURT: Then would you have to say, "or is" --

MRS. SILVER: "Or is in the process," yes.

THE COURT: All right. What is next?

MRS. SILVER: Next is an addition of VII to page 3.

THE COURT: I thought you had a problem with III.

MRS. SILVER: Yes. We do not understand it and wondered if it was not redundant in view of the general

provision in regard to excessing.

THE COURT: That may be.

MRS. SILVER: Because anybody who is bumped we think is perhaps excessed.

THE COURT: I see your point there.

MRS. SILVER: But if it is not redundant then we do not exactly understand how it would mesh with the excessing provision.

THE COURT: I get you. Perhaps it is redundant. I had not thought of that.

MRS. SILVER: The thought was that if a person is excessed to a position where he bumps another individual, his excessing has already been done on the formula basis I suggest.

THE COURT: All right.

MRS. SILVER: And we are not sure what is added by an additional protection for the bumpee at that juncture. The bumpee himself becomes an excessee and cannot be excessed except in accordance with the formula.

THE COURT: I think I see what you mean. Let me reflect on that.

You want to add --

MRS. SILVER: Finally, we suggest that there be some provision for reporting to plaintiff's counsel the compliance

with your formula in the event of excessing, because otherwise there is simply no way for anybody to know either what has happened or whether excessing decisions have been made in compliance with the order.

I have suggested language. I can either read it or hand it to your Honor or both.

THE COURT: Why don't you hand it to me and then we will make it a matter of record somehow.

You propose, and I quote, "Within 30 days after any termination of a supervisory position that results in excessing or bumping of personnel, the Board of Education shall report to plaintiffs the name and race of all such excessed or bumped personnel, the positions from which so excessed or bumped, positions to which transferred and data/or computations on the basis of which defendants contend that such excessing, bumping and transfers comply with the formula set forth in paragraph 2 of this order."

All right. I wonder, though, just in passing, about this, as to whether or not the plaintiffs couldn't simply inquire of the supervising officer. After all, he is a public official. I hope he is not keeping secrets, although --

MRS. SILVER: Your Honor, I think that the record in these proceedings indicates that it is very difficult to simply inquire of a staff person of the Board of Education on

an informal basis and it really is a bureaucratic decision as to whether to make information available.

THE COURT: All right. We will see.

What does the City think of this, Mr. Bernikow?

MR. BERNIKOW: Your Honor, I must inform you that I was with the Board of Education this morning and they have asked me to ask you for a bit more time to comment on this. They have not had an opportunity to digest it. They have a number of questions. I have to ask you for some time to comment on it.

I would, however, like to ask certain questions now, if I may.

THE COURT: All right. I really feel that I ought to be sitting out there instead of up here. But you go ahead. I took the risk, I am sure, when we sat down to try and bring an end to this controversy ourselves in my chambers. So you go ahead.

MR. BERNIKOW: With regard to paragraph I(a), I take it that that is systemwide. In other words, Group A, B and C refers to all the supervisors in the City as opposed to just the supervisors that are excessed.

THE COURT: I really don't know how to answer that, given what was said on the rest of the order. You have got to set up a proportion here, you know, and that means you have

to deal with the total number or total numbers. I really do not know how to answer that other than what is said there.

I am really astonished. It seems to me the answer to that is very clear.

MR. BERNIKOW: I thought that, your Honor, but I just --

THE COURT: In any event, what is next?

MR. BERNIKOW: With regard to reassignments --

THE COURT: Where are we now, what page?

MR. BERNIKOW: The third page, IV. I did not prepare any language, but it refers to persons from Group A or Group B who have been excessed shall be reassigned to appropriate supervisory vacancies in such a manner that the designated proportions in that paragraph do not decrease.

We would like some language in there. Are you saying that the same thing applies to Group C, in other words, that Group C shall be reassigned in accordance with the same formula?

THE COURT: I see what you mean. You see, what we are saying there in effect is again something I mentioned as a preamble this afternoon.

We are concerned or, I should say, this Court can only be properly concerned about the classes or the persons who are involved in the plaintiffs' clase in our federal suit.

Therefore, Class C really is not our direct concern. You see what I am saying?

MR. BERNIKOW: Yes, I do.

THE COURT: That is the reason why we do not mention Class C back there on page 3.

MR. BERNIKOW: But that --

THE COURT: You see, we are concerned with doing nothing to undercut the gains which plaintiffs have achieved in our case known as Chance vs. the Board.

MR. BERNIKOW: Unfortunately my client is very concerned with Group C.

THE COURT: Yes.

MR. BERNIKOW: We would like some clarifying language.

THE COURT: I think I can suggest a couple of things we might do. But I think I see your point.

Why don't we just let it go at that. I am going to set up some machinery for you and your clients to respond, without prejudice to the Court, however, and to the plaintiffs I think both of us, at least, are beginning to be a little bit upset by the delay.

Am I fair in stating that? All right.

Mr. Greenwald?

MR. GREENWALD: Yes, your Honor. I have a number of

questions to ask the Court.

I have taken into consideration, of course, the Court's previous remarks. For example, I know Group A is defined as consisting of all black supervisors and Group B is simply defined as consisting of all Puerto Rican supervisors.

THE COURT: Yes.

MR. GREENWALD: Does that indicate that it is the Court's desire to consider all black supervisors, whether they have had twenty years of service and license or whether they have been appointed pursuant to the Court's procedures, namely, Circular 30? Because if that is the situation -- and you are eliminating any consideration of Group C. Group C, being white and others, or others, may consist in great part of individuals who have been appointed through the same procedures, namely, Circular 30, on the job, as members of Group A and B.

THE COURT: I get you. What is next?

MR. GREENWALD: You see, I had been under the assumption -- I do not know if I am correct or not -- that when you were defining Group A and B you were referring back to the previous order, which talked about those groups having been promulgated as a result of the procedures that followed the staying of the examination. Otherwise you are including

in Group A and B both individuals who took the on-the-job examination and individuals who have been licensed for ten, fifteen or twenty years, while Group C consists of whites and others who took the on-the-job examination procedure as well as hundreds who took previous licensing examinations.

THE COURT: All right. What is next?

MR. GREENWALD: That is one procedure. We basically have no objection to Mrs. Silver's suggestion relating to paragraph I, defining it, whether regular or active. We think it really is not necessary, but it does add a little to the situation.

As we understand the proposal of the Court, we are not quite sure that the bumping procedure is redundant. The only way the bumping procedure can be redundant is in accordance with our understanding, that is, the excessing plans are activated both intra and inter-district, and then your proportions or your ratios maintain. If that is the Court's plan, that is, the excessing provisions are followed both intra-district and inter-district, I agree with Mrs. Silver that the bumping becomes redundant.

THE COURT: You mean paragraph III, which deals with bumping.

MR. GREENWALD: Yes, where it says, "No person may be bumped" --

THE COURT: Yes.

MR. GREENWALD: If in fact intra-district excessing and inter-district excessing are followed then in fact the bumping becomes redundant.

The next part, reassignment, as we understand it -- I hope the Court sees it that way -- is those people who are excessed of all groups, A, B and C, must then be reassigned by Mr. Arricale in some sort of ratio to excessing vacancies. If that is correct, Mr. Arricale is required by this order to reassign those in excess pursuant to the Court's group formula, then bumping in fact is redundant.

THE COURT: All right.

MR. GREENWALD: We have a different problem. Counsel for the Board of Education asked the Court whether your formula, A over certain population, is based on the population of the school supervisory staff as a whole or based on the school supervisory population in excess.

Now, we suggest that it makes more sense to use Group A as a formula over the excessed Group A, B and C than it does over the entire school population, for the simple reason that excessing will be done on a licensed basis, and under the existing law, which the Court has indicated it wanted to affirm, it makes no sense, in our opinion, respectfully, to match apples and oranges, apples being those in

excess and oranges being those other populations, because under the law a person can only be placed in a vacancy which he has the license or the training to fill.

So it makes no sense to compare A, that is, Group A, that is, black supervisors who are excessed, with black supervisors, white supervisors and others who have been serving in licensed and appointed. I think the ratio would make more sense if you compared black supervisors who are excessed to those black supervisors who are -- I assume in Spanish surname supervisors in excess and others. In either event, that is the ratio that must be assigned and appointed by Mr. Arricale to existing vacancies.

Now, I also assume that that language presupposes that assignment by Mr. Arricale of Group A, B or C to existing vacancies is tantamount to appointment, because the Court has indicated that he does not want to vacate or upset the state law.

Under the previous excessing situation, before the arrival of this case, anyone who was excessed was placed in a vacancy and appointed and their rights, privileges and responsibilities continued regardless of -- not from their date of service in the new situation in the district but systemwise. The Court indicated that it was interested in this system under a citywide official.

So I am suggesting that it makes more sense and would be more equitable to A and B people, because we are concerned with placement and license, not on the line. This is not a situation where somebody can be filled into the maintenance department. It is a situation where a black acting principal we want assigned by Mr. Arricale to a vacancy of principal, elementary school, for example, and that assignment be tantamount to appointment, with all rights and privileges retroactive to the date of his license or appointment, which you indicate are the same.

THE COURT: All right. Mr. Rebell.

MR. GREENWALD: If I may.

THE COURT: I thought you were finished.

MR. GREENWALD: I am sorry. Now, we have another suggestion. The Court has made this order retroactive to July 30, 1974. We think that is obviously appropriate and correct. We are asking though --

THE COURT: I am sorry. I did not catch that. Incorrect?

MR. GREENWALD: No, correct. You have made it retroactive to July 30, 1974. That is correct, your Honor, in our opinion, and obviously is what is required.

We respectfully ask the Court to reconsider the November 30, 1976 expiration date, for the simple reason,

your Honor, that our collective bargaining agreement expires October 1, 1975. We hope to be in contractual negotiations prior to that time and we are frankly concerned that by extending the order into what would be a full year and one month of the new collective bargaining agreement, we are opening the way for the City Board of Education to support an argument that certain actings are less deserving of certain rights and benefits, like salary.

THE COURT: Please, Mr. Greenwald. I am not interested in that. The Federal Court is not interested in entering into the collective bargaining between your organization and the city. We have no right to at this time.

MR. GREENWALD: I understand that. That is why this order --

THE COURT: This order is not designed to do anything other than take care of the interests of this Court in this case and to protect the plaintiffs' achievements or gains, if you will, in this litigation, and no more.

MR. GREENWALD: Your Honor, we think --

THE COURT: I do not want to get into the terrible thicket of city and state regulations and laws, and even more than that, I do not think that this Court should get into the collective bargaining process between your people and the city.

MR. GREENWALD: I agree with your Honor. That is why I am saying that I think the plaintiffs' class will be adequately protected by making this order expire on November 30, 1975.

THE COURT: Originally, you remember, plaintiffs -- and I think Mrs. Silver will correct me if I am wrong about this -- originally I think you wanted any order here to run until 1977 at some point.

MRS. SILVER: That is correct, your Honor.

THE COURT: And I was of the mind to do that because I did not think it was such a bad idea in the first instance. The reason I pulled it back was I thought by that time we would have a little better chance to -- if it was important to anybody to do so -- to evaluate the situation from the vi w- point of this case and that we wouldn't have to run too long, so as to interfere with anybody else's interests in the bargain.

But to pull it down to 1975 on som theory that this is going to have something to do with your collective bargaining, I just do not see that.

MR. GREENWALD: Your Honor, by November 1975 we will have had two experiences of excessing, this current one and the next, if any, and I think that might form enough experience, rather than, frankly, get into a situation where

we are foreclosed from acting on behalf of the individuals who are the subject of this action.

THE COURT: All right. Anything else?

MR. GREENWALD: I have no further comments at this time.

THE COURT: All right. Mr. Rebell.

MR. REBELL: Your Honor, I must confess to being somewhat distressed about the thrust of the proposed final order. I well understand your concern not to become involved in issues of state law and we have been walking a very narrow tightrope in that regard for the last couple of months in this situation. However, from the perspective of the community school boards, we are very fearful that the implementation of this order will go far toward centralizing authority of personnel matters, far more in that direction than state law requires at the moment, and --

THE COURT: There are a number of courts in the state system which have made it very clear that in terms of this issue of excessing, for example, there is nothing in the new law, for example, or any old law in New York but what points to the common sense and desirability of having this problem taken care of on a citywide basis.

MR. REBELL: Your Honor, if I may make two points on that. First, several weeks ago when we discussed this you

seemed inclined to defer making a judgment on aspects of this case which may involve state law issues until the ruling of the Court of Appeals in our pending case.

THE COURT: It is true I raised that question, but I have raised a lot of questions and I get no answers from any of you people. You do not agree on anything. That is why I am trying my best to practice law here in order to get this thing done.

You are quite right. I did raise that question.

MR. REBELL: Your Honor, as a point of information I might state I had mentioned at that time that I thought our case would be on the calendar for November for the Court of Appeals. It has now officially been placed on the calendar for November 21. In conjunction with the fact that the Board of Ed seems to be asking for more time, I would ask you to take that into consideration before making a final ruling here.

Secondly, to give a specific example of the type of situation I am talking about, my first problem is I am fearful that this order could preclude our state remedies and relief, assuming that we win on that appeal. But even if we lose on that appeal, I think that this order may have the effect of upsetting the administrative balance in the system, and let me give you a very specific example.

As I understand the order, the computations of the racial proportions is going to be done on a citywide basis and that seems to me to mean that if the district superintendent in Community District X wants to excess one person at a certain time in the year, before he can excercise his discretion and before he can consider the educational needs of that community he first has to get in touch with the central office, he has to await data collection by them, he has to get a ruling from them as to whether he can excess this person or that person, and I think what you are effectively doing by this system is turning the entire process over to Mr. Arricale and totally centralizing the excessing process in a way that has not occurred in the past.

In the past at the least we could say that the initial excessing decisions came from the local level. There was some centralization once the people got into this interdistrict pool. We are disputing that on a state law ground, but just accepting that as the system for the moment, the present order is going to bring Mr. Arricale's office directly into the process ab inutio at the individual district level.

THE COURT: Perhaps this is a matter of semantics, but I do not think, if I understand you, that that is really true at all. In other words, the individual school districts will still have a decision to make as to whether or not they

want to excess. What Mr. Arricale will do at a central level is keep track of all this, as I believe he properly can do and should do under state law, and I also believe that as a matter of federal law we cannot leave up to an individual school district the choice or sole discretion to protect the plaintiffs in this case called Chance vs. the Board. I just do not think that makes any sense at all.

MR. REBELL: Your Honor, I certainly am not asking the Court to leave compliance with the requirements of this case --

THE COURT: I know you are not, but what you are saying in effect is that your community boards will have nothing to say, and that to me is just ridiculous. They will. They are going to be the ones still who are going to decide, I assume.

The only thing is that we have to make sure that nothing is done to diminish the rights of the plaintiffs in this particular suit.

MR. REBELL: But, your Honor, we have a very basic question as to whether the rights of the plaintiffs or any other supervisors in this system accrue at the district level or the citywide level, and this order I respectfully submit is totally based on an assumption that they are citywide, an assumption that we have not had clarified at the state level.

THE COURT: The plaintiffs in this case are not limited to any particular district or community board's jurisdiction in this city.

MR. REBELL: Your Honor, I agree that the Federal Court can certainly go in and require a recentralization of the process in order to vindicate the rights of the plaintiffs, but I am saying, especially in the light of the fact that we have serious state law issues yet to be resolved, to be resolved in an argument two weeks ago, and given the fact that we have considered alternatives and your Honor himself put forward a proposal three weeks ago that I believe interfered much less dramatically with the ongoing state level system, I am basically asking for a reconsideration. I think this present order will have a devastating effect on the issues as seen by my clients.

THE COURT: I hope you are wrong, Mr. Rebell, because one of the reasons why we took a whole cloth new approach was to avoid any kind of problem of that sort that you apparently are arguing for. I do not want to interfere with state law. I do not want to interfere with the individual community boards as an agent of this Court. I assure you I do not. That is one reason that I thought we were going to be better off taking this approach.

I must say, in all honesty, Mr. Patterson told me

before we began that he did not see how anybody could object to this, and I said, "Maybe you do not see or I do not see, but I will assure you of one thing. I will be astonished if everybody does not object." I think I have been vindicated pretty much so far in that pragmatic judgment.

MR. REBELL: To clarify my point, if I may, and I think to try to really get across what I am saying, for example, if the State Court of Appeals should rule a month from today or thereabouts that excessing should be confined to the intra-district level, I am just questioning where we are going to stand in relation to this order, because the federal order is going to take precedence over that State Court ruling and in effect will have made that entire state law case superfluous, because --

THE COURT: Oh, no. I, of course, am not as proficient and knowledgeable about the specifics in that case, but the issues to me in that case, which I do believe I understand, I do not think are trampled upon at all by this. I really feel that what I am proposing here is designed to stay out of that.

I do agree that we must insist that plaintiffs' federal rights be vindicated. Now, if the State Courts, by chance, should do something in deciding your case that tramples upon federal law, why, then I would have to agree

with you. But I cannot believe that the highest court of our state is going to do anything of that nature at all. In fact, I think there is an overwhelming presumption against their ever doing such a thing.

MR. REBELL: I certainly did not mean to raise the issue in that way.

THE COURT: I know you did not. Of course you did not.

MR. REBELL: What I am saying is that this order contemplates a certain type of administrative process which I believe is inconsistent with our view of state law which we are hoping will be upheld.

Could I just ask two questions.

THE COURT: May I just put it this way: I believe that in asking Mr. Arricale to do this a number of things are being achieved which are quite different than I gather you think is intended here. One, I believe that under existing uniform New York decisional law there can be no doubt that excessing has to be viewed wherever possible as a citywide problem. The Courts have said that.

MR. REBELL: That is what we have upon appeal, your Honor.

THE COURT: I know you do. But I have to accept the law as it now exists.

Even assuming that the Court of Appeals is going to somehow say that this is wrong, I am then saying that all that we are doing here is asking Mr. Arricale as an agent of the city school system as a whole to assist this Court in vindicating the rights of the plaintiffs which previous orders of this Court in this case have staked out, and no more.

The plaintiffs are entitled to no less. Their federal rights are supervening insofar as any possible contradictory state principles might be concerned. We know that. The Federal Constitution is paramount. No matter what we may think about it, that is very simple.

All I am saying is that Mr. Arricale, who does represent the city as a whole, is in the only position that I can see in vindicating the plaintiffs' rights here recognized in Chance against Board of Education. That has nothing at all to do with all the intricacies, as I see it, that you are concerned with in your appeal.

I will tell you what, however. All is not over with yet. I am going to take a short recess. I knew it was going to be hot and heavy, but I did not quite expect it would last this long. I want to comment briefly on two other things though before we take a recess.

First of all, Mrs. DuBois, I was served today with a

letter just before lunch, while I was sitting here with my jury, and I see that once again the Board is seeking another extension and I am agrieved to see that they are taking the view that more recently filed cases are the reasons for their delay, which I think is just wrong as a practical matter. I do not know what in the world we can do about it. November 11 is Monday.

That is another thing that agrieves me. It puts the plaintiffs and this Court in a position where I think the Board wants to have us. I am really upset about that and I want to take that up when we come back.

Finally, I want to know from you, Mrs. DuBois, primarily, about these motions for counsel fees. I insist that I do not want to even consider those matters seriously until I come to that day, if it ever comes at all, when I think this case is over. Otherwise we will be wasting our time.

MRS. DuBOIS: Your Honor, I would like to address both those things. I would like to first take up the matter of the letter, although I guess you want to take that up after the recess --

THE COURT: Yes.

MRS. DuBOIS: -- because there is a serious problem.

THE COURT: I did not call this conference. I did

not know this letter was going to be served on me.

MRS. DuBOIS: The serious problem I think the letter raises is not the one your Honor raises but a much more serious one, because the Board indicates for the first time in this letter that they are now seven months and continually delinquent with respect to the on-the-job performance examples, which is what I would like to really address myself to.

On the counsel fee thing, I understand your Honor's point, but what I would like to point out is that there are two stages that we envisioned on the counsel fee matter, the first stage determining liability, after which, assuming liability is determined, we had hoped --

THE COURT: You are missing my point. You are missing my point. I do not want to argue with you about that. What I want to know and what I insist upon keeping uppermost in mind -- I do not even want to waste your time and my time thinking about this, whether it is in one stage or two stages, until I have some assurance that Chance comes to an end.

There is no sense in that on two grounds. There is no point in talking about counsel fees until we know that counsel hasn't any more work to do. Second of all, this Court has far too many things to do which take far greater priority

by law and I do not have the time to do bootless errands around here.

I am concerned about it. I do not mean to be rude to you or your interest in the motion. You see the point or points I am making. I want you to respond, now that you know somewhat cryptically how I feel, when we come back.

Let's just take a few minutes.

(Recess)

THE COURT: I am going to treat this business of the excessing issue and I am going to repeat certain things which I think would cut through most of these matters which all of you except plaintiffs have raised here this afternoon. I think the time has come when the Gordian knot has to be cut. It is interesting to see you people and listen to all your complaints and debates, but we have had hearings -- actually this excessing issue was first raised at another subject matter hearing on July 12 of this year. Then on July 30 we had a hearing devoted to this issue of excessing. That hearing was continued to another day, September 13 of this year. Then our next adjourned session or hearing on excessing was October 10 of this year. Finally today, November 8, we have had another discussion about the subject.

I repeat that this Court has found that although there is not as much information about excessing or possible

excessing for the present or in the foreseeable future which is a matter of record, there is sufficient information from the material filed by the city at the request of the Court to indicate that the plaintiffs are entitled to some order of the Court to protect them in the rights under federal law which they have achieved in this litigation.

Because of this ultimate finding, I believe it is necessary for this Court to do as plaintiffs pray, enter some kind of an order fully protecting the plaintiffs' class in the achievement of the rights which they have recognized in this federal litigation.

On the other side of the coin, however, the reason that this Court yesterday called all counsel up and had available to them a new draft by the Court of a proposed order is because my law clerk, Mr. Patterson, and I, upon reflection, came to the view, in analyzing the previous proposals both by the judge and counsel and what was discussed at other hearings that I recited earlier in the summer and fall, that we had to have an order which did not meddle unnecessarily or, if possible, at all in issues of state law, contract obligations and school district's, whether they are community district's or the central district's policy.

Essentially, as I stated at the outset today, our job, that is to say, t[illegible] jurisdiction or power of this Court,

really is confined to protecting the plaintiffs in this case. To the extent that the Court can do so without interfering with the normal operation of the school system and the New York laws which deal with the school sy tem, we, the Court, should do so.

Now, it seems to me that what was attempted here in the most recent draft of the Court to get all of the parties off dead center was just the spirit of what I have said. I would agree with Mr. Rebell and others that it is not the business of this Court -- whether that is fortunate or unfortunate, I would not know -- but it certainly is not the business of this Court to solve all the problems of excessing under state law or local law.

Now, I think that it might also be said it could be possible that there might be some possible potential disruption with the plans of say a given community school board of maybe even the central school board if this Court was to enter any kind of order at all. I cannot say that that is impossible. It may well possibly occur. But the point as I see it is this Court has got to act. I assure Mr. Rebell and anybody else interested that the last thing that action by this Court would be intended to do is to affect or upset or intrude upon the present appeal before the Court of Appeals of our state. It is not this Court's intention to

meddle with that at all.

In short, as I see it, and as I saw it when we submitted this order to you yesterday, it was designed to protect the plaintiffs' class by merely requiring that their percentage representation among supervisors in the City of New York does not diminish because of such items as budgetary restraints which necessitate excessing or layoffs.

Further, however, and looking at it positively, I believe the proposal by this Court does allow for the representation of the plaintiffs' class to increaseas positions become available if they pass new and non-racially discriminatory tests for supervisory licenses here in the City of New York.

I insist that the present draft does not require that the percentiles or percentage representations, if you will, of each class increase as a result of layoffs or increase as a result of whatever new hiring there may be. Indeed, as I see it at least, the order cannot be read sensibly to require that the percentages remain as high as they are now or as high as they may be at any future date. Further, the order is designed merely to provide that the percentage may not decrease as a result of excessing or bumping due to fiscal or other constraints affecting the city school system.

Now, of course, it is true that the percentages may decrease or increase as the result of the hiring of new personnel who would pass the racially non-discriminatory licensing examinations for supervisory personnel or as the result of voluntary retirement or resignation or firing for cause.

Basically, I have come to the conclusion that our former discussions and our former proposals, both the Court's and counsel's, or some compromise between those former proposals, should not be final, because I really think they would have interfered too much with the state's interests in seeing that the school system operators in accordance with state law, and they might also, that is, those previous proposals we discussed, have unduly offended the considerations of the community school boards and the central school board in their proper operations under the new state law as it affects the city school system.

Now, I am going to require that Mrs. Silver on behalf of the plaintiffs' case submit a proposed order on notice substantially as you want it, Mrs. Silver. In other words, take my proposal with the amendments which you suggested today.

My own view is that some of them are not really necessary, but I am not going to argue about them. For example,

I do not really see that it is necessary to say those inserts in I(a). The same is true in I(d). But if you think they make it clearer I am not about to disagree or argue.

One point I would like to make is that I am afraid Mr. Patterson and I may have been wrong in paragraph I(a) when we referred to Group B as all Puerto Rican supervisors. I think you have used better wording. What did you say all throughout this case, Spanish --

MRS. DuBOIS: My memory is that we did use Puerto Rican, at least in the beginning of the case.

THE COURT: Will you check so that we are consistent.

MRS. DuBOIS: Yes.

THE COURT: That is all.

MRS. DuBOIS: I think you were correct.

THE COURT: I do think that I would have to agree with the point, however, as you, Mrs. Silver, and I think Mr. Greenwald too made the point. You both construe what we mean essentially correctly here and because of that you can say that III probably is redundant. I am tempted to say, "Well, a little redundancy won't hurt." But since you feel that it is ambiguous I am persuaded by that. Therefore, if you want to leave it out I would love to consider it.

Now, I do not know how you feel about paragraph V. Mr. Greenwald raised that. I do not want to say that I am

sure what the right answer is, whether he is right or I am right. Maybe you have some other ideas.

MRS. SILVER: Your Honor, we, as you pointed out, originally asked for 1977, and we expressed our concurrence in this order in the interest of compromising and being helpful to the Court. I don't see a reason to push it back to 1975 and would object to a shortening.

THE COURT: Why don't you do it the way you want it. You put in either the date I did, if that is all right, or if you want to go back to your original '77 proposal, fine. I do not care. I will feel free to consider it when I get it from you. How is that? And I think something like you proposed in paragraph VII is perfectly acceptable as far as I am concerned for the moment.

Now, I am going to ask you, could you get it out with a notice for settlement for a week from today, the 15th? That will give Mr. Bernikow's people, I hope, a chance to respond, to that he can submit a counterorder.

Do you follow me, Mr. Bernikow?

MR. BERNIKOW: You want me to submit a counter by the 15th as well?

THE COURT: Yes, or submit a letter saying, "We would like to see this change," either way.

The same invitation, of course, is going to be

extended to Mr. Greenwald and Mr. Rebell.

If you want to submit a counterorder you submit it, or if you want to submit a letter saying, "I wish you would change provision so-and-so," however you want to do it.

MR. BERNIKOW: Your Honor, I would like to have a day after Mrs. Silver's order. It may very well be that the Board will agree with her order. I would like to have her final order and then have a day thereafter.

THE COURT: You know what her final order is going to be like. I am trying to follow the customary procedures of New York courts for decades, if not centuries, which you all understand.

MR. BERNIKOW: That is true. If Mrs. Silver submits the order as you wrote it --

THE COURT: I don't think she is going to change it substantially. If she does I will ask her to call you.

MR. GREENWALD: Your Honor, Mrs. Silver and I, while the Court was in recess, agreed to a certain outline on the way this thing was running. I had detected a slight problem, and Mrs. Silver doesn't believe it is a problem, but I wonder if the Court would be receptive to the thought.

There may be an interim period in which the excess supervisors, A, B or C -- there may be a question as to whether they are being paid and by whom.

THE COURT: Look, Mr. Greenwald, I need help, and this is not helpful. I have done what I consider more than any judge is obliged to do to get this thing resolved. I am tired of practicing law without compensation. It is up to you people to get down and do what I said. It is more than fair.

I have extended you every courtesy since July 12. The time comes to resolve this. Arguments and debates here in open court do not help me now.

MR. GREENWALD: I think Mrs. Silver and I are in agreement.

THE COURT: Fine. You do whatever you want to do. You are a responsible, capable lawyer, to my knowledge, and I mean that. I am not being fresh or funny. I mean that. Therefore I think that it is particularly encumbant upon you and her, if you agree on anything, to say so. You will have a right to submit it to me next Friday.

MR. GREENWALD: Thank you, your Honor.

THE COURT: I want to turn to, first, the problem of the Kaye, Scholer letter. It is getting late, gentlemen. It has been a long day. Let's not have a lot of debates, again, on this. What is the problem?

MR. JACOBSON: I might be able to cut matters rather short. Perhaps my letter was psychologically not properly put. In fact, except for perhaps 32 or 37 people, depending

on how one views the matter, all of these III(b) examinations have been completed. In fact, as I understand things, the number that have to be examined may not even be 32 or 37, because under the final judgment people were given the option of not only taking the on-the-job test to become qualified but also taking the III(b) test, and the Board of Examiners' list of the number of people who have to be examined under III(b) includes people who may not in fact want to be examined under III(b) any longer. So there are very few people left and the Board of Examiners merely needs a short additional period to conclude these 30 examples of about 32 people at most.

In my letter I referred to a number of the problems which have caused the Board to not complete all of them.

THE COURT: You know, that really offends me, because even if I have to go to Judge Griesa -- I am prepared to go to him -- I do not think that it is incumbent upon the Board to use these other lawsuits as an excuse to not comply with orders of this Court in an ancient lawsuit now going on five years old. I just think that it is outrageous.

MR. JACOBSON: Your Honor, I might say, first --

THE COURT: I will be perfectly glad to meet with Judge Griesa and point this out to him. I do not believe he would disagree with me. I do not think you people have made it clear to him what is going on here.

MR. JACOBSON: Your Honor, I might say that perhaps more than any party to this lawsuit, the Board of Examiners would be very happy to see a personal comprehensive examination system adopted.

THE COURT: I should think so.

MR. JACOBSON: We would be very happy to see that happen. The interim system would then be phased out over a period of time and the Board of Examiners could go on with its business subject to the plan that is approved by the Court. I can assure you that the Board of Examiners' interest is not in dragging this matter out. The reference to these other matters was only to bring to the Court's attention the fact that there are matters which are somewhat beyond the examiner's control.

THE COURT: I say to you, sir, that you knew before you wrote this letter, your office certainly knows, that I am well aware of those other cases.

Second of all, you do not seem to see my point. I believe this case deserves priority. It is the first in point of time by years. It has been litigated up and down the river and all around the bend. The Court of Appeals and this Court, you, all other counsel, agree we should and we must conclude it with dispatch. For that reason I was deeply offended by your letter, because what you were saying was,

in effect, "Don't blame us, Judgee baby, it is all the fault of other judges in your Court," and so on and so on. Well, that is just not so. And if it is so, you have every right to speak to me and I will speak to the other judges.

My suspicion is that the other judges are not really the cause of this at all, or the other cases. My suspicion is that it is the same old business we have encountered in the past.

MR. JACOBSON: Your Honor, perhaps my letter was not properly drawn.

THE COURT: I would agree with that. It certainly offended me. I will be honest with you.

MR. JACOBSON: I might add this: The reason that we did not write a letter earlier was that the Board of Examiners was honestly trying to conclude every one of these examples.

THE COURT: I will accept that.

MR. JACOBSON: With the additional short period, all of these III(b) examples will be concluded and a report will be filed as required by paragraph VI of the final judgment.

THE COURT: You say that you want or, rather, your client wants until November --

MR. JACOBSON: We say the end of November, because there are, as I say, depending on how one views things, 30

some-odd or less people to be examined, some of whom I understand are unavailable and we may have to just file a report and say that some of these people are unavailable.

THE COURT: If they are unavailable, I agree.

Mrs. DuBois, what do you say to all this?

MRS. DuBOIS: Just with respect briefly to the excuses about the other cases, I just think that those excuses, as I understand it, have been made in the other cases also. I really do not think from plaintiffs' point of view we care any more whether the Board of Examiners has a reason or does not have a reason for why it has failed to comply from day one with every single provision of the order. It seems to me that is irrelevant at this point to us.

THE COURT: You do not have to convince me at least that these other cases are no good excuse. As a matter of fact, I think you and this Court deserve priority. I really do. And I am prepared to order it if need be.

MRS. DuBOIS: What I would like to go on to is what to my mind this letter doesn't just illustrate but conclusively demonstrates, that the Board of Examiners is either unable or unwilling to comply with the order as written specifically with respect to the on-the-job performance evaluations, and I think in light of that inability or unwillingness it brings us back to the point at which your

Honor really entered the case and we were discussing sanctions or alternative relief for plaintiffs.

I would like to focus not on the III(b) group but on the III(c) group, which is the on-the-job performance examinations, which is skipped over rather lightly and tellingly in the letter. The letter states that as of November 7th, 153 persons have qualified for the second round, as they call it, of on-the-job performance evaluations.

THE COURT: Where is this?

MRS. DuBOIS: Page 4 of the letter, your Honor, next to the last paragraph at the top of the page.

It then goes on to say that under present circumstances the second round of the evaluations has been delayed. I would like to point out to the Court first exactly what the order says about the on-the-job performance evaluations.

Those evaluations were supposed to have been going on on an ongoing basis ever since this Court signed its order of April 15, which was the order, you remember, providing sanctions and the only thing that ever got the Board of Examiners off the ground at all. Now, under the order ever since that date on an ongoing basis, persons who satisfied the five-month requirement were supposed to be getting notice from the Board of Education and then were supposed to be evaluated within 60 days by the Board of Examiners.

THE COURT: I know.

MRS. DuBOIS: This is the first indication to us and the Court that the Board of Examiners was totally ignoring the order's provisions and I take it to be an indication that they are acting in complete bad faith, since we have asked on several occasions of the Board of Examiners' counsel whether something was going on with respect to the on-the-job performance evaluation and were given sort of general indications that yes, it was, but they did not know what exactly.

THE COURT: Here we are late in the day. I really share a great deal of your concern. I really do. This is an outrage. Suddenly to be told about it a few hours ago I think is really very unfair to you and unfair to the Court. But what do you think that we can do about it now?

MRS. DuBOIS: I think we can do exactly what we asked the Court to do last spring and what you did in partial form. I really do feel that this demonstrates the Board of Examiners will not perform these on-the-job performance evaluations.

What we asked for last spring was a sanction that provided that if the Board of Examiners did not finally meet a deadline set by the Court for performing the first round, that then a sanction or alternative relief would go into effect, and what your Honor's April 15 order provided as the

sanction or the alternative relief was that plaintiffs' class or that this group of people who have satisfied the five-month eligibility qualifications would be automatically licensed unless the local school boards certify within 30 days that they were not performing adequately.

It seems to me that seven months after that order was entered, the Board of Examiners has again been seven months delinquent in what it is supposed to do under the order and has demonstrated beyond any doubt it is not going to perform those examinations the way it is supposed to and instead of our having to go through delay after delay, I would suggest that the Court enter essentially paragraphs 6 and 7 of its April 15 order, but now just simply enter that as a sanction or as alternative relief, which appears to be the only practical relief for plaintiffs' case.

THE COURT: You are going to have to submit an order, because that will not be self-triggering right now.

MRS. DuBOIS: It won't. I realize I would have to submit an order and I have not obviously been able to since I only got this today. But it seems to me that under the circumstances that is the only thing that will get us and the Court out of this endless bickering over dates which are never met. There has not been a date met since July 12, 1973, when Judge Mansfield's order went into effect.

THE COURT: You submit a proposed order. I would think that Kaye, Scholer is going to have to have an understanding with their client. This is just endless.

MR. JACOBSON: Your Honor, may I be heard. I think the plaintiffs have distorted the facts in stating what has occurred.

THE COURT: I am just looking at what you say in your letter.

MR. JACOBSON: My letter sated that as of a certain date another group of individuals has served five months on-the-job and therefore under the provisions of paragraph III(c) were entitled to be, if they applied, examined for their on-the-job performance.

Now, the plaintiffs' counsel has stated that we have never met any deadlines. That is nonsense. The Court knows that over 700 people were examined on-the-job. A report was filed with the Court in July with respect to those people.

THE COURT: But we have had an awful lot of deadline busting and it has happened in such a way that we are almost powerless as a practical matter because we never learn about it until the last moment. Then it is really sort of too late.

I have been practically a fulltime master, as I see it, in this case anyhow. We would be going on daily if we really tried to cope with these problems.

MR. JACOBSON: What the plaintiffs are referring to now is not a date that says October 2nd a certain number of people are supposed to be examined. It is a provision in the final judgment which refers to how the process of on-the-job examination is supposed to be accomplished and it does not have a self-executing date.

THE COURT: No, no. She agreed with that.

MRS. DuBOIS: I do not agree with that. That is just simply inaccurate, your Honor. I can point to two parts of the order. There are two parts of the order that make clear --

THE COURT: You agree that there is no self-triggering process about the sanctions?

MRS. DuBOIS: About the sanctions, but as far as the date --

THE COURT: I understood you the first time.

Look, it is not going to do any good for the three of us sitting here tonight frustrated by this unfortunate position. What you do not seem to understand, sir, is Mrs. DuBois and this Court are put in an impossible position by this kind of behavior. There is nothing we can do about it except get it out in the open now.

I am going to permit her to submit a proposed order on the basis of an affidavit, if she cares to, as to why she

thinks that this is bad faith non-compliance with the April order of this Court. You are obviously entitled to respond.

I am sorry. It is a tragedy that we should go through all this trouble. But it is fairer and better than having a haggling session when I am in the midst of a long trial, Mrs. DuBois is in the process of doing other things, I am sure, to be served with a letter such as this today. It was not even scheduled. I did not call this meeting for this purpose.

MR. JACOBSON: Your Honor --

THE COURT: As far as I am concerned, you took complete advantage of all of us. I am sure that your client and you did not mean to, but that is the way it came out.

MR. JACOBSON: Your Honor, my letter was not addressed to the question of the on-the-job tests which plaintiff is now raising to this Court.

THE COURT: You raised it. I got the same impression Mrs. DuBois did. It just sounds to me as though this is a complete fireball. I am sorry. It may not be true, but your letter did nothing but raise haggles up and down the line.

MR. JACOBSON: Your Honor, may I raise two matters?

THE COURT: No, you may not, because you are the one who said we had to put this on tonight.

MR. JACOBSON: I did not say that at all.

THE COURT: Look at your letter.

MR. JACOBSON: I suggested you either consider it today or at some other time at your convenience, your Honor.

THE COURT: In the meantime Mrs. DuBois is faced with the problem that you are not going to comply. That is precisely what I am suggesting too. She is going to have an opportunity to submit a proposed order.

MR. JACOBSON: I just wanted to distinguish between two things.

THE COURT: You will have time to distinguish. Do not say any more. This letter is bad enough as it is.

MR. JACOBSON: Your Honor --

THE COURT: Please. You are going to have your chance. Not tonight.

Now, would you submit and serve Kaye, Scholer with a proposed order or whatever you are prepared to do when you think about it. I think it might be wise from your own point of view and it might help Kaye, Scholer if you submit an affidavit reciting chapter and verse as to what happened in your view and what should be done.

Then you, sir, or Mr. Cohen, will have a chance to respond as you see fit.

MR. JACOBSON: I do not want to address myself to that. I just want to draw one distinction.

The bulk of my letter -- let me put it that way -- was addressed to 3(b) examinations. Plaintiffs' concern now is addressed to on-the-job performance evaluations, which is a different question.

All I ask is whether it is my understanding that plaintiffs do not object to allowing the Board to finish the 3(b) by the end of November and their only objection has to do with the on-the-job tests.

THE COURT: Let's not take my time and the reporter's time for that. You can ask Mrs. DuBois that as soon as we are finished. I have had a long day, sir, and I am not going to hear haggles like this. It is not my function, as I see it, let alone making any sense, if it were.

Mrs. DuBois, the remaining business that I raised, and perhaps I was unwise for similar reasons in raising it, because I do not want to get you concerned.

I understand the position of the city and you. There is a fight about liability. I am going to hear you about that at the right time. But I insist that we not do that until I see something in the nature of a final order of judgment closing this case out as best we can close it.

MRS. DuBOIS: Your Honor, I can understand the position. Obviously that is of much lesser importance, the matter of counsel fees is of less importance that solving the

substantive issues in the case. I cannot possibly disagree with that. I do not think it is important enough to spend a lot of time on it.

My feeling was that the issue of liability is something that we have argued, have briefed, and to plaintiff's way of thinking, is relatively simple, and if it were decided it would enable us and the defendants to work out everything else and present a final judgment that included the fees.

THE COURT: I see. In other words, what you are saying is you would like this Court to write an opinion or a memo resolving the liability issue?

MRS. DuBOIS: Yes, your Honor.

THE COURT: Now or as soon as I can?

MRS. DuBOIS: Right.

THE COURT: Okay. I think that possibly would be a useful endeavor.

MRS. DuBOIS: Then we thought stage two, if there were liability, how much it should be would be something that certainly would be subject to negotiation and might be able to be worked out without further bothering the Court.

THE COURT: I do not think that is such a bad idea. Mr. Bernikow and you both feel you have submitted all you think you should on the legal issue?

MR. BERNIKOW: On the issue of liability.

THE COURT: Yes.

MR. BERNIKOW: Yes, that is true.

THE COURT: Frankly, I had hoped to avoid even doing that because I have been engaged in long trials. Those will end some day soon and I am sure I can get to it.

Okay. I get you. Let's leave it at that. If you could answer this young gentleman, Mr. Jacobson, as you see fit, then I will just wait to hear from both of you.

MR. BERNIKOW: Your Honor, may I just raise one further thing. I know it is a late time.

In my opening remarks I did raise a question as to reassignment insofar as Group C. We are interested --

THE COURT: Look, Group C, my dear fellow, I did not want to be rude when you raised it, but look at the proportions. You could not put it any differently than I put it. Don't you see what I am saying?

MR. BERNIKOW: I do, your Honor.

THE COURT: I do not know what else I can say to you But if you do not like it you have every right to submit a counterproposal.

MR. BERNIKOW: It is not that we do not like it, your Honor. We just want it to be spelled out before any confusion in the future.

THE COURT: You couldn't have a proportion for Group

C. Don't you see that? I do not know what else to say to you. It seems so obvious to me.

MRS. SILVER: Your Honor, in fairness to Mr. Bernikow I think I must say that we have something of the same problem. On the assumption that the meaning of IV is that someone might be placed in any position, including a position where the effective placement would be to bump someone else, if that were true --

THE COURT: Look, I cannot argue with you. If you do not like it change it. I did the best I can. I do not want to quibble with you nice people. If you do not feel I am giving you every chance, believe me, I just want you to do it.

We have spent since July. Unless I get something done soon I am going up the wall. That is the usual problem in this case.

MRS. SILVER: Your Honor, I will undertake in connection with the submission of our proposed order to attach a covering letter explaining anything on which we think there may be any doubt.

THE COURT: Just change the language, Mrs. Silver. I have utmost confidence in your judgment. If you want to change the language I will not be offended. I just want to do the job.

We rack up hours of talk, talk, talk, and we get nowhere. I want to get somewhere. You are free to put any change in. If you want to talk to Mr. Patterson about it, why, talk to him. I cannot imagine anything that would bother me less than to have you say, "I would rather have this language."

MRS. SILVER: We are more concerned, your Honor, that someone will subsequently say that they did not understand what was meant.

THE COURT: Fine. I understand that. I do not have any pride about that. I just want to get some movement for a change. It is so hard in this case to get anything done of substance.

MRS. SILVER: May I impose on you one moment further, your Honor, to ask one question about clarification of this document.

THE COURT: I am not going to. If you want to talk to Mr. Patterson -- he knows as much if not more than I will ever know about it now -- why don't you ask him.

Fine. Good night.

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J 298a

Letter dated November 14, 1974, from Michael A. Rebell to Tyler, J.

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November 14, 1974

Honorable Harold R. Tyler, Jr.
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ 4141

Dear Judge Tyler:

Pursuant to your instructions at the hearing last Friday, I am writing to convey the comments of amicus curiae New York City School Board Association concerning the Court's proposal for resolution of the pending "excessing" issue.

As I mentioned during my oral remarks at the hearing, the Association is greatly concerned about the extent to which the proposed Order may interfere with the operations of the decentralized school system in the City of New York. Although we appreciate that any attempt to protect the Constitutional rights of the plaintiff class in this matter may to a certain extent affect the domain of State law and administration, we believe that in comparison with your prior proposal the interference inherent in the reformulated proposal would be extensive. Specifically, we see the following problems:

1. The required calculation and re-calculation of ethnic proportions prior to each excessing shift would involve a significant time lag. Especially if the system is to be implemented on an inter-district basis, each community board would have to await the compilation of information by the central office of personnel from all 32 community districts before any actions could be taken. Based on past experience with this type of central clearance, it would be nc exaggeration to assume that a delay of at least several weeks or even months would be the norm in each excessing situation.

Letter dated November 14, 1974, from Michael A. Rebell to Tyler, J.

2. The necessary administrative discretion of community school boards to make rational excessing decisions in times of budgetary stringency would be significantly impeded if the boards were to be required to clear all proposed excessing shifts with the central office of personnel. Under both the traditional excessing system and the Court's prior proposal there would be no such interference with decision-making regarding excessings at the district level; inter-district seniority requirements or special rights of the plaintiff class would have been considered only after supervisors had been excessed out of their own districts.

The anticipated central involvement in local personnel decisions would be extensive since it appears that every intra-district personnel shift, "bumping", or lay-off would be subject to prior central review. If implemented on an inter-district basis, this system would make personnel administration in each community district depend on the on-going decisional process in every other district and would grant the Executive Director of Personnel wide-ranging discretionary power to determine, for example, whether District "A" rather than District "B" must change an initial excessing decision to bring the ethnic proportion lines into city-wide balance.

If the reformulated proposal is to be signed in substantially its present form, we would respectfully request, at the least, that the Executive Director of the Office of Personnel be required to present proposed regulations (and any later modifications of such regulations) to the plaintiffs and the community boards for comment, at least two weeks prior to their effective date.

3. Although the Association is not prepared to take a position opposing the imposition of an explicit racial quota system where there would be no alternative method for vindicating plaintiffs' rights, we seriously question the desirability of risking the potential dissension and polarization of a racial quota system under present circumstances, especially since plaintiffs have previously indicated that they would be satisfied with a system that provided special protection for all supervisors appointed since the date of this Court's original injunction, rather than only for members of specific ethnic groups, some of whom were appointed even before the date of the injunction.

Letter dated November 14, 1974, from Michael A. Rebell to Tyler, J.

REBELL & KRIEGER

In contrast to the serious administrative and political problems raised by the Court's reformulated proposal, the Association believes that the approach taken in the Court's earlier proposal would fully protect plaintiffs' rights while minimally interfering with the administration of the school system. To the extent that the prior proposal impinged on the domain of State law issues, such interference was fully consistent with the on-the-job performance licensing approach already endorsed by the Court and would have guaranteed an excessed supervisor priority rights to continue his career opportunities under the jurisdiction of his original appointing authority. The only serious objections raised by defendants against the prior proposal involved allegations of excessive cost. We are prepared to show that these allegations were exaggerated and that, in any event, the time lags inherent to the reformulated proposal inevitably would result in even larger cost factors.

During the course of my oral remarks at the hearing, I expressed an additional concern that the implementation of your proposed Order might undermine the position of the Association and a number of individual community school boards in the excessing litigation now pending before the New York State Court of Appeals. Both your comments from the Bench and further remarks of Mr. Patterson after the hearing have satisfied me that the proposed Order was carefully drafted to ensure that its provisions could be implemented under either an inter-district or an intra-district excessing system; in other words, it is my present understanding that your Order must be read as being neutral on the State law issues now pending before the Court of Appeals. In order to remove any possible doubt on this point, I would respectfully suggest that the following provision be added to the Order if it is to be signed in substantially its present form:

> "The provisions of this Order are not intended to interfere with existing State laws and regulations, except where absolutely necessary to protect rights of members of the plaintiff class which are guaranteed under the Constitution and laws of the United States. Accordingly, it is explicitly understood that the excessing system and the modifications of said system ordered herein will be implemented on a "city-wide basis" or a "community district basis" in accordance with the provisions of the New York State Education Law as finally determined by the Court of Appeals of the State of New York."

J 301a

Letter dated November 14, 1974, from Michael A. Rebell to Tyler, J.

REBELL & KRIEGER

Honorable Harold R. Tyler, Jr. -4- November 14, 1974

In conclusion, for all the reasons mentioned in this letter and at the hearing, we would respectfully request that the Court reconsider the desirability of its prior proposal in light of the serious administrative and political problems raised by the present reformulated Order, or, at the least, delay the signing of said Order until such time as the New York State Court of Appeals will have rendered a final judgment on the pending State law issues which will be argued in Albany on November 21st.

Respectfully submitted,

REBELL & KRIEGER

By /s/ M.A.R.
Michael A. Rebell

MAR:st

cc: Jeanne R. Silver, Atty.
Elizabeth DuBois, Atty.
Leonard Bernikow, Esq.
Leonard Greenwald, Esq.
Saul Z. Cohen, Esq.

J 302a

Letter dated November 15, 1974, from Jeanne R. Silver to Tyler, J.

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

November 15, 1974

Hon. Harold R. Tyler, Jr.
U.S. District Judge
U.S. District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

In accordance with your instructions, we have noticed for settlement the enclosed Proposed Order with respect to excessing. This order is a slightly modified version of the draft which Your Honor submitted to the parties last week and which was discussed in court last Friday.

As we stated in Court, plaintiffs felt that the plan you proposed was a reasonable compromise of the many conflicting contentions which have been presented. Thus, our proposed order is intended to adhere in all respects to the substance of your draft. Our modifications, intended primarily for clarity, are confined to those which we discussed in court, a new definition paragraph (I) a provision (II.C) with respect to automatic appointment of newly licensed personnel and some elaboration of the reporting provision already submitted to Your Honor (VI).

The primary purpose of the new definitions is to clarify and try to resolve the problem we raised in Court about possible redundancy of "bumping" provision in paragraph III of your draft. On reflection we believe the solution depends upon the manner in which the term "excessing" is defined. If, as present Contractual Provisions seem to indicate, the term includes both bumping and being bumped, bumpings are covered by the "Excessing" formula, and the further protection of the "Bumping" provision indeed seems unnecessary. We have accordingly eliminated the provision while making the presumed definition of "excessing" explicit in paragraph "I.B."

J 303a

Letter dated November 15, 1974, from Jeanne R. Silver to Tyler, J.

The modification of paragraph I.C of your draft (II.C of ours) is designed to resolve the issue previously raised before Your Honor of whether an acting supervisor is automatically appointed upon licensure pursuant to the interim evaluation plan. We understood that your paragraph I.C contemplated that an assignee within Group A or B should be deemed appointed at least for the purpose of the excessing covered by the Order. The language of the first sentence in paragraph II.C would make more explicit this provision, which is essential as an element of any excessing order to which we could consent.

Plaintiffs believe that it is desirable at the same time to resolve the appointment problem for all purposes. Since we understand that defendant Board of Education shares our view that automatic appointment is desirable, we have included the second sentence of paragraph II.C with that objective.

Sincerely yours,

Elizabeth B. DuBois

Jeanne R. Silver

cc: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Leonard Greenwald, Esq.
Michael A. Rebell, Esq.

Plaintiffs' Notice of Settlement dated November 15, 1974

THE UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs

v.

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141
H.R.T.

NOTICE OF SETTLEMENT

TO: Adrian Burke
Attn: Leonard Bernikow
The Corporation Counsel
Municipal Building
New York, New York 10007

Kaye, Scholer, Fierman, Hays and
Handler
425 Park Avenue
New York, New York 10022

Attorneys for Defendants

Michael Rebell, Esq.
Rebell & Krieger
230 Park Avenue
New York, New York 10017

Attorney for Amicus Curiae

Leonard Greenwald, Esq.
Frankle & Greenwald
80 Eighth Avenue
New York, New York 10011

Attorney for Intervenors

J 305a

Plaintiffs' Notice of Settlement dated November 15, 1974

SIRS:

PLEASE TAKE NOTICE that the annexed proposed order will be presented to the Honorable Harold R. Tyler at the United States Courthouse, 40 Foley Square, New York, New York, on the 19th day of November, 1974, for settlement and signature.

Dated: New York, New York
November 15, 1974

JEANNE R. SILVER
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ELIZABETH B. DuBOIS
(Legal Action Center of the City of New York, Inc.)
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116 Street and Broadway
New York, New York 10027

JACK GREENBERG
10 Columbus Circle
New York, New York 10019

Attorneys for Plaintiffs

Plaintiffs' Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (H.R.T.)

ORDER

Plaintiffs and defendant Board of Education having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented:

Plaintiffs' Proposed Order

IT IS HEREBY ORDERED:

This Court's Order of July 30, 1974 is rescinded and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system.

I. Definitions

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

II. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position whether on an acting or regular basis in the New York City public school system as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into three groups. Group A shall consist of all black supervisors. Group B shall consist of all supervisors of Puerto Rican or Latin American descent or origin. Group C shall consist of all supervisors not in Group A or Group B.

B. Any person otherwise qualified to be in Group A, B or C shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed; and

b. he has failed to take or complete or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

C. For purposes of implementing this order, the date of "appointment" of a supervisor not excluded from its operation shall be deemed to be the earlier of (1) the date on which he was appointed to his position or (2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendants. For all purposes, the licensure of any individual serving in an acting position pursuant to assignment in accordance with then applicable rules or regulations of the defendant shall also constitute his appointment, effective as of the date of his assignment.

D. If a person occupying a supervisory position has not had an opportunity to be examined although he has served for more than five months and is eligible for on-job evaluation, or is in the process of taking an examination or re-examination for a supervisory license, or if the results of such an examination or re-examination have not been evaluated, the supervisor shall not be excessed until the results are evaluated unless he could be excessed even if he held a valid supervisory license as of the date of his original assignment to a supervisory position.

III. Excessing:

J 309a

Plaintiffs' Proposed Order

A. The total number of supervisors shall be calculated separately for Group A(A), for Group B(B), and for Group C(C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups (A+B+C). The proportion that A bears to the total (A+B+C) shall be calculated (A/(A+B+C)). The proportion that B bears to the total (A+B+C) shall be calculated (B/(A+B+C)).

B. The number of supervisors in Group A who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed A/(A+B+C). The number of supervisors in Group B who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed B/(A+B+C).

IV. Reassignment:

Persons from Groups A and B who have been excessed shall be reassigned to appropriate supervisory vacancies in such a manner that A/(A+B+C) and B/(A+B+C) do not decrease.

V. Overseer:

The Executive Director for Personnel, Board of Education shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, and agreements.

VI. Reporting:

Plaintiffs' Proposed Order

The defendant Board of Education shall furnish to plaintiffs copies of all instructions, directives or orders issued to any appointing authorities, their responsible officers, or other persons in respect to the excessing of supervisors. No later than 15 days prior to the effective date of any excessing decisions or orders, the Board shall report to plaintiffs the name and Group of all personnel to be excessed, the positions from which they will be excessed, positions to which they will be transferred, and data or computations on the basis of which defendants conclude that such excessing and transfers will comply with this Order.

VII. Duration:

This Order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1977.

Dated: New York, New York
November , 1974

U.S.D.J.

Letter dated November 15, 1974, from Leonard Bernikow to Tyler, J.

The City of New York

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

ADRIAN P. BURKE, *Corporation Counsel*

November 15, 1974

Hon. Harold R. Tyler, Jr.
U.S. District Judge
U.S. District Court
Southern District of New York
Foley Square
New York, N.Y. 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

Pursuant to your instructions, I am enclosing herewith a proposed order dealing with excessing, on behalf of the Board of Education of the City of New York.

The Court in distributing its proposed order to counsel, on November 8, 1974, emphasized its concern about preserving the gains achieved by plaintiffs in this action. We believe the Board's order fulfills that end without the imposition of a quota system. The Board of Education is unalterably opposed to the concept of quotas as implied in the Court's order. The Board's order insures jobs for all excessed persons including Blacks and Puerto Ricans. It insures against any Black or Puerto Rican supervisor losing his or her job because of excessing. It even goes further than the court's ratio and insures that the current number will not be dismissed because of excessing. The reason for this is that all those to be excessed will be guaranteed a placement in an appropriate existing vacancy or one that will open before any such vacancies are filled anywhere in the system. It must be remembered that excessing of supervisors is only done once a year, by August 1st, or it is not permitted, and that there are more than four supervisory jobs for every supervisory vacancy.

The only problem arises in the so-called exotic titles such as "Supervisor of Early Childhood", "Supervisor, Library" and "Attendance Supervisor". The overwhelming majority of those few would be excessed, if not all of them, in that category have long been in the system and are most probably

Letter dated November 15, 1974, from Leonard Bernikow to Tyler, J.

not Black or Puerto Rican. The Board of Education has stated it will attempt to find positions or make adjustments even for this group.

Respectfully yours,

/s/
Leonard Bernikow
Assistant Corporation Counsel

CC's

Saul Z. Cohen, Esq.
Leonard Greenwald, Esq.
Michael A. Rebell, Esq.
Jeanne R. Silver, Esq.

Defendant Board of Education's Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS G. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141

ORDER

I. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position in the New York City public school system as of the date that any supervisory position is to be terminated.

B. Any person otherwise qualified shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed;

b. he has failed to take or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take the appropriate examination (including on-the-job evaluation).

C. For purposes of implementing this order, the date of licensure as a supervisor and the date of appointment as a supervisor shall be determined after a person has completed the appropriate licensing examination or re-examination. If the person passes such an examination or re-examination, the date of his licensure or appointment shall relate back to the date on which he was originally assigned to a supervisory position.

D. If a person occupying a supervisory position is in the process of taking an examination or re-examination for a supervisory license, or if the results of such an examination or re-examination have not been evaluated, the supervisor shall not be excessed until the results are evaluated unless he could be excessed even if he held a valid supervisory license as of the date of his original assignment to a supervisory position.

II. Excessing:

Defendant Board of Education's Proposed Order

If a supervisory position has been or is abolished by an appointing authority at any time between July 20, 1974 and October 31, 1976, the supervisor affected by such abolition or dislocation will be placed in an excessed pool.

No appropriate vacancy shall be filled until this excessed pool is exhausted.

III. Duration:

This order shall be effective retroactively to JUly 30, 1974, and prospectively until November 30, 1976.

IV. Overseer:

The Executive Director for Personnel shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, and agreements.

ated: New York, New York
November , 1974

U.S.D.J.

J 3168

Letter dated November 18, 1974, from Leonard Greenwald to Tyler, J.

LAW OFFICES
FRANKLE & GREENWALD

[redacted] AVENUE, NEW YORK, N.Y. 10011

(212) 242-0200

MAX H. FRANKLE
LEONARD GREENWALD
SHELDON SCHORER

November 18, 1974

Hon. Harold R. Tyler, Jr.
United States District Court
Southern District of New YOrk
United States Court House
Foley Square
New York, New York 10007

FILED
NOV 19 PM 10
LAW DEPARTMENT

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

Pursuant to your instructions, I am respectfully submitting herein a proposed Order in the above matter. As you will note, the Order closely follows the Order submitted previously by Ms. Frankel.

Changes contained in my Order are primarily for the purposes of clarity and/or structure.

I reiterate my previous comment made in open court that Groups A and B as presently defined are broader than the previous definitions. I must also note that the present composition of the groups is larger than the class represented by the plaintiffs. As such, Groups A and B, as presently constituted, consist of Blacks and Puerto Ricans and/or Latin Americans, regardless of initial date of appointment or assignment. The Court's Order now provides extraordinary protection to Blacks, Puerto Ricans, and/or Latin Americans, who admittedly were not discriminated against by the testing procedures of the Board of Examiners.

We similarly express concern, as did Mr. Frank Arricale, that these groupings might create unnecessary tensions and divisions. This should be avoided, inasmuch as it is clear that no supervisor will be reduced in rank as a result of excessing.

I respectfully call the Court's attention to paragraph VII of the Order, which provides that the Court Order will be in effect until November 30, 1976. This is in accord with both the original proposals of the plaintiff and the Court.

Respectfully yours,

LEONARD GREENWALD

LG:bsw

Letter dated November 18, 1974, from Leonard Greenwald to Tyler, J.

2--Hon. Harold R. Tyler, Jr., November 18, 1974

cc: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Jeanne R. Silver, Esq.
Michael Rebell, Esq.

Intervenor's Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs, : 70 Civ. 441 (H.K.T.)

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., :

Defendants. : ORDER

NOV 19 1970
LAW DEPARTMENT

Plaintiffs having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in a Collective Bargaining Agreement between defendant Board of Education and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the class represented by plaintiffs, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant Board of Education, the CSA as intervenor, and the New York City School Boards Association as amicus curiae having each submitted their position

to the Court, and the Court having issued a preliminary Order in respect to this matter of July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the intervenor, and amicus curiae were represented,

IT IS HEREBY ORDERED:

This Court's Order of July 30, 1974, is rescinded, and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system:

I. Definitions

A. As used herein, the term "examination" includes all examinations authorized by paragraph III of the Final Judgment in this case, including on-the-job evaluations in compliance with Special Circular #30, 1972-73, dated October 25, 1972.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

II. Persons Affected by this Order

A. The persons affected by this Order shall consist of all persons occupying any supervisory position,

whether on an acting or regular basis, in the New York City public school system as of the date that any supervisory position is to be terminated. These supervisors shall consist of three groups: Group A, Black supervisors; Group B, supervisors of Puerto Rican or Latin-American descent or origin; Group C, all supervisors not encompassed by Group A or Group B.

B. Any person otherwise qualified to be in Group A, B, or C shall be exluded from the operation of this Order either

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed, or

2. if

a. he does not hold a valid supervisory license as of the date of excess, and

b. he has failed to take or complete or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

C. For purposes of implementing this Order, the date of "appointment" by an appointing authority of

a supervisor not excluded from its operation shall be deemed to be the earlier of (1) the date on which he was appointed to his position or (2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendants. For all purposes of this Order, the licensure of any individual serving in an acting position pursuant to assignment in accordance with then applicable rules or regulations of the defendants shall also constitute his appointment, effective as of the date of his assignment.

D. If a person occupying a supervisory position has not had an opportunity to be examined although he has served for more than five months and is eligible for on-the-job evaluation, or is in the process of taking an examination or re-examination for a supervisory license, or if the results of such an examination or re-examination have not been evaluated, the supervisor shall be excessed only if he would have been excessed had he held a valid supervisory license as of the date of his original assignment to a supervisory position.

III. Excessing

A. The total number of supervisors shall be calculated separately for Group A (A), for Group B (B),

and for Group C (C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups (A+B+C). The proportion that A bears to the total (A+B+C) shall be calculated [A/(A+B+C)]. The proportion that B bears to the total (A+B+C) shall be calculated [B/(A+B+C)].

B. The number of supervisors in Group A who are to be excessed from supervisory positions to non-supervisory positions at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed A/(A+B+C). The number of supervisors in Group B who are to be excessed from supervisory positions to non-supervisory positions at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed B/(A+B+C).

IV. Reassignment

Persons from Groups A and B who have been excessed shall be reassigned to appropriate supervisory vacancies in such a manner that A/(A+B+C) and B/(A+B+C) do not decrease.

Intervenor's Proposed Order

V. Overseer

The defendants' Executive Director of Personnel shall take all steps necessary to insure compliance with this Order; shall require appointing authorities to supply all information necessary to execute this Order; and shall require appointing authorities to act in whatever manner is necessary to execute this Order, provided, however, that he complies to the maximum extent possible with all other relevant laws, by-laws, policies, contracts, and collective bargaining agreements.

VI. Reporting

Defendant Board of Education shall furnish to plaintiffs and the CSA copies of all instructions, circulars, directives, or orders issued to any appointing authorities in respect to the excessing of supervisors. No later than 15 business days prior to the effective date of any excessing decisions or order, the Board shall report the name and Group of all personnel to be excessed, the positions from which they will be excessed, the positions to which they will be reassigned, and data or computations on the basis of which defendants conclude that such excessing and transfers will comply with this Order.

Intervenor's Proposed Order

VII. Duration

This Order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1976.

Dated: New York, New York
November 1974

U.S.D.J.

Letter dated November 18, 1974, from Michael A. Rebell to Tyler, J.

REBELL & KRIEGER
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DENNIS C. KRIEGER

WESTCHESTER OFFICE
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(914) 949-8525

November 18, 1974

Honorable Harold R. Tyler, Jr.
United States District Court
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ 414

Dear Judge Tyler:

I am writing to express our very strong objections to the second sentence in paragraph II C of plaintiffs' proposed Order on the excessing issue. The objectionable provision attempts to slip into the proposed Order a major, contested issue which is not at all relevant to the present excessing concerns and which amicus curiae has at all times been led to believe it would have an opportunity to fully argue and brief prior to any decision by the Court.

At the outset, I must reiterate our position that the Association has no objection to granting full excessing rights to all acting supervisors covered by the proposed Order, whether or not they are formally licensed or appointed. As such, we have no objection to the first sentence of paragraph II C of plaintiffs' proposed Order or to the similar language in the Court's original draft. We do, however, strongly maintain that any attempt to automatically "appoint" supervisors "for all purposes" upon their licensure would be a direct violation of the New York State Education Law and of the provisions of the Final Judgment in this case signed by Judge Mansfield on July 12, 1973.

New York Education Law Sections 2590-e, 2573(i)(b), 2590-j.4(d) clearly provide that permanent appointments to supervisory positions in elementary and junior high schools shall be made exclusively by community school boards. Persons licensed by the Board of Examiners have always been required

REBELL & KRIEGER

Letter dated November 18, 1974, from Michael A. Rebell to Tyler, J.

to be approved by the community boards before receiving a specific permanent appointment. Community boards have never been told or led to believe that temporary approval of individual supervisors to serve on an acting basis under Circular 30 would at a later date deny them their power and their duty to re-appraise a candidate for a permanent appointment.

We believe that consistent with the requirements of the State Education Law and the dictates of sound administrative practice, community boards should be given a reasonable amount of time to assess recently licensed candidates according to the more rigorous standards required of a permanent appointee. Indeed, the provisions of Arts. III and VIII of the Final Judgment of July 12, 1973 indicate that Judge Mansfield reasonably anticipated that community boards would retain their statutory appointment powers and would be free to consider all newly licensed supervisors for specific permanent appointments.

Plaintiffs' attorneys indicate in the cover letter attached to their proposed Order that Defendant Board of Education apparently shares their view concerning the desirability of automatic appointments. The fact that plaintiffs and defendants may agree that their mutual interest would be served by compromising and violating the statutory rights of the community school boards is the precise reason that the Association has vehemently attempted to gain intervenor and amicus status in this case. We respectfully submit that the Association is at the least entitled to a full opportunity to argue and brief this critical issue and that there is no basis in the present record for the second sentence of plaintiff's proposed paragraph II C to even be considered by the Court.

Respectfully submitted,

REBELL & KRIEGER
Attorneys for Amicus Curiae

By M. A. R.
Michael A. Rebell

MAR:st
cc: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Elizabeth Du Bois, Atty.
Leonard Greenwald, Esq.
Jeanne R. Silver, Atty.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Order of Tyler, J., dated November 22, 1974

[SAME TITLE]

Plaintiffs and defendant Board of Education having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented, and the Court having made its findings on the record at the hearing on November 8, 1974:

IT IS HEREBY ORDERED:

This Court's Order of July 30, 1974 is rescinded and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system.

I. Definitions -

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-the-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

II. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position, whether on an acting or regular basis, in the New York City public school system as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into three groups. Group A shall consist of all Black supervisors. Group B shall consist of all supervisors of Puerto Rican or Latin American descent or origin. Group C shall consist of all supervisors not in Group A or Group B.

B. Any person otherwise qualified to be in Group A, B, or C shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed; and

b. he has failed to take or complete or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

Order of Tyler, J., dated November 22, 1974

C. For purposes of implementing this order, the date of "appointment" of a supervisor not excluded from its operation shall be deemed to be the earlier of (1) the date on which he was appointed to his position or (2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendants. ~~For all purposes, the licensure of any individual serving in a~~ ~~supervising position pursuant to assignment in accordance with then applicable~~

D. A person occupying a supervisory position shall not be excessed until the results of his examination or re-examination have been evaluated if

1. he has not had an opportunity to take or complete an examination for a supervisory license, although he has been assigned to a supervisory position for more than five months and is eligible for on-the-job evaluation; or

2. he is in the process of taking an examination or re-examination for a supervisory license; or

3. the results of his examination or re-examination have not been evaluated,

unless he could be excessed even if he held a supervisory license valid as of the date of his original assignment to a supervisory position.

III. Excessing:

Order of Tyler, J., dated November 22, 1974

A. The total number of supervisors shall be calculated separately for Group A(A), for Group B(B), and for Group C(C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups (A+B+C). The proportion that A bears to the total (A+B+C) shall be calculated (A/(A+B+C)). The proportion that B bears to the total (A+B+C) shall be calculated (B/(A+B+C)).

B. The number of supervisors in Group A who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed A/(A+B+C). The number of supervisors in Group B who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed B/(A+B+C).

IV. Reassignment:

If persons from Group A Group B, or Group C who have been excessed are reassigned to appropriate supervisory vacancies, such reassignments shall be done

A. in such a manner that (A+B)/(A+B+C) does not decrease unless there are no excessed supervisors from Groups A ~~and~~ or Group B available for reassignment; and

Order of Tyler, J., dated November 22, 1974

B. in such a manner that A/(A+B+C) does not decrease unless there are no excessed supervisors from Group A available for reassignment, provided, however, that the ratio may decrease to A/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group B; and

C. in such a manner that B/(A+B+C) does not decrease unless there are no excessed supervisors from Group B available for reassignment, provided, however, that the ratio may decrease to B/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group A.

V. Overseer:

The Executive Director for Personnel of the Board of Education shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements.

VI. Reporting:

The defendant Board of Education shall furnish to plaintiffs and the

Order of Tyler, J., dated November 22, 1974

CSA copies of all instructions, directives, circulars, or orders issued to any appointing authorities, their responsible officers, or other persons in respect to the excessing of supervisors. No later than 15 days prior to the effective date of any excessing decisions or orders, the Board shall report to plaintiffs and the CSA the name and Group of all personnel to be excessed, the positions from which they will be excessed, positions to which they will be transferred, if any, and data or computations on the basis of which defendants conclude that such excessing and transfers will comply with this order.

VII. Duration:

This order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1977.

VIII. Construction:

To the maximum extent possible this order shall be construed consistently with all other relevant laws, contracts, policies, by-laws, and agreements. In particular, it shall not be construed to prejudice or limit the defendant's rights, if any, to create a preferred pool of excessed supervisors and/or to reassign or appoint them to vacancies wherever situated in the New York City public school system. Further, this order

Order of Tyler, J., dated November 22, 1974

shall not be construed to prejudice or limit the excessed supervisors' rights, if any, to return to vacancies in their home districts.

Dated: November 22, 1974

H. F. Tyler, J.

U.S.D.J.

J 334a

Letter dated December 17, 1974, from Leonard Be.nikow to Tyler, J.

The City of New York

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

ADRIAN P. BURKE, *Corporation Counsel*

December 17, 1974

BY HAND

Hon. Harold R. Tyler, Jr.
United States District Judge
U.S. Court House
Foley Square
New York, New York 10007

Re: Chance, et al. v. Board of Examiners, et al.
(70 Civ. 4141)

Dear Judge Tyler:

This letter is submitted on behalf of the Board of Education to request a modification of this Court's Order dated November 22, 1974, concerning excessing.

Under that order, Community School Districts must submit the name of the least senior supervisor in license in each school where a position is abolished. All such proposed excesses must be reported to the Executive Director for Personnel for analysis in order to insure that the group has a similar racial composition to all supervisors under the jurisdiction of the Board of Education. This procedure will result in the excessing of a supervisor from a specific school in a district even though the district has a similar vacancy available in a neighboring school.

It has always been the policy of the central board to allow a local community school board to absorb its own excessed staff into schools within the district. In addition to the fact that the supervisor was selected and assigned by the local community and should wherever possible remain in the district that selected him, this procedure is the only administratively feasible method to place excessed supervisors.

The requirement that the Executive Director of Personnel administer intra-district excessing rather than allowing the district to fill its vacancies first will greatly increase the number of excessees who must be placed in the proposed excessing group. The previous figure of approximately

Letter dated December 17, 1974, from Leonard Bernikow to Tyler, J.

60 excessed supervisors would increase three-fold since this figure was based solely on inter-district excessing rather than including intra-district excessing. It is therefore proposed that each community superintendent who has an excessed supervisor in a specific school must transfer that excessed supervisor to a similar vacancy within the district. If no similar vacancy exists, the supervisor's name and title will be submitted to the Executive Director for Personnel. All such supervisors except for those holding unique titles will be guaranteed a comparable position in the school system. The Board will attempt to make accommodations even for those with unique titles. In this manner, the racial composition of the supervisory staff will not decrease city-wide.

Under the present order the following supervisors were not granted excessing rights:

1. Appropriately authorized supervisory personnel serving less than five (5) months and one (1) day.

2. Interim Acting Supervisors

3. Supervisors who failed to take the on-the-job examination and could have, or supervisors who failed to file for a re-examination, or failed to re-take it and could have.

All other personnel will still be granted excessing rights as indicated in the present court order and will be placed by the Division of Personnel.

Although I am aware that your Honor would not entertain a motion to resettle on the issue of the establishment of the three pools of supervisors in the November 22, 1974 order, the Board of Education has requested that I again express their strong disfavor for this solution. The Board believes this to be the establishment of a quota system, to which, I mentioned in a previous letter, they are unalterably opposed.

This system will only cause polarization and will tend to keep white supervisors in white districts and minority supervisors in minority districts. The Board believes this to be unnecessarily polarizing since the racial composition of the Supervisory Staff will be maintained city-wide without the use of quotas.

J 336a

Letter dated December 17, 1974, from Leonard Bernikow to Tyler, J.

As we mention above every excessed supervisor, except those with unique titles, will be guaranteed a comparable position in the school system. As your Honor knows, at present, and in the foreseeable future, there are four vacancies for every excessed supervisor.

Respectfully yours,

Leonard Bernikow
Assistant Corporation Counsel

cc: Elizabeth B. DuBois, Esq.
Howard A. Jacobson, Esq.
Leonard Greenwald, Esq.
Michael A. Rebell, Esq.
Jeanne R. Silver, Esq.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

Boston M. Chance, Louis C. Mercado, et al,

Plaintiffs,

-against- 70 Civ. 4141

The Board of Examiners and the Board of Education of the City of New York, et al.

Defendants.

----------x

Before:

HON. HAROLD R. TYLER, JR.,

District Judge

New York, New York
December 20, 1974

APPEARANCES:

ELIZABETH B. DuBOIS, Esq.
JEANNE R. SILVER, Esq.
Attorneys for Plaintiffs

ADRIAN P. BURKE, Esq.
Corporation Counsel, City of New York
Attorney for Defendant Board of Education
By: LEONARD BERNIKOW, Esq.
Assistant Corporation Counsel

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FRANKLE & GREENWALD

Transcript of Proceedings dated December 20, 1974

APPEARANCES

FRANKLE & GREENWALD, Esqs.,
Attorneys for Council of Supervisors
and Administrators
By: LEONARD GREENWALD, Esq., of Counsel

MICHAEL A. REBELL, Esq.,
Attorney for New York City School
Boards Association,
Amicus Curaie

- - -

THE COURT: If I may start off first by observing that on December 17th I received, with my thanks to Mr. Bernikow, his letter of December 17. I am not sure, however, that I understand exactly how the Board of Education would like the excessing order heretofore entered by this Court specifically modified. I am frank to say that I have my own ideas, but I am also equally frank to say that I am tired of being the draftsman and the catalyst for any significant progress in this matter. I would have hoped, in other words, that there would have been some specific suggestions of phraseology which I would be more than happy to consider.

I also might note that I am totally in the dark as to the position of any other participants in this case on the matters apparently suggested by Mr. Bernikow or suggested, for reasons of their own, by the respective parties.

So there we are.

MR. BERNIKOW: Your Honor, first let me say I think there are actually three motions before you today. I am sure you will be surprised to hear that.

THE COURT: No, no, I am not. I am talking though about our excessing order problem, which I would like to get resolved, frankly.

MR. BERNIKOW: Your Honor, we have made these motions because the Board finds the present order -- just they cannot live with it. I can have Mr. Arricale go into the details and we would be happy to prepare new language and hopefully with the consent of plaintiffs. I can tell you that last evening the plaintiffs were gracious enough to meet with us to see if we could work out something insofar as the quota aspect of this order. We did make some progress, but unfortunately we haven't been able to get to our clients.

THE COURT: You see, this is the problem. We go on endlessly in this way. This is why I constantly feel frustrated by my role in this great litigation. I feel that more times than not I am acting as a lawyer in this case, just to hopefully get something finally resolved.

May I suggest this, Mr. Bernikow. I don't blame your clients for being exercised. They are in the business

and I feel sorry for them for that reason alone. It is a difficult business.

Second of all, I long ago, I thought, offered you people every chance to come up with some proposals, and finally, since nothing ever happened that anybody would ever agree on at all, I made some proposals, and as is customary all too frequently, nobody seemed to be particularly upset, so I entered the order. Then all of a sudden everybody got upset.

Well, since I am used to that I suggested that any ideas specific you had, let's have them. I still don't think I have got any very specific ideas.

So the way I think we are going to have to do it, because I just don't have the time to continually get into these bootless arguments, I would suggest the following: I would be prepared to understand and indeed even agree that something could be done to improve the order entered by this Court about November 22, 1974 to take care of the following problems:

First, some language changes dealing with the procedures set forth in the excessing order probably can be clarified to show without dispute that the procedures should be applied on a district-by-district basis for purposes of intra-district excessing and on a city-wide

basis for purposes of inter-district excessing.

Second, I would think on my own motion -- I also think that the city probably would like this too; at least, I read this into your letter, Mr. Bernikow -- I think secondly as well that perhaps we should do something to make abundantly clear that an assignment and licensesure as a supervisor should automatically constitute an appointment for all purposes and not just for excessing purposes.

Thirdly, I would think, as I understand again the Board, if I understand completely, I would agree that perhaps we ought to clarify matters to make it beyond serious dispute even by all of us who are known disputants about everything that supervisors who volunteer in writing for transfers instead of relying on their excessing rights should not be counted in determining the numbers of excessees.

Fourth, I think we might consider clarifying the language on the subject of establishing that previous intra-district excessing and transferring should be accepted and the amended order should be applicable to intra-district movements or transfers or whatever they might be called after a date such as November 22nd, the date of the existing excessing order, or perhaps a later date, today or next week, or whenever we could do the job.

Now, there is one other thing that I believe the plaintiffs probably are still pressing or, if I may say so, Miss Silver, you may be pressing, and that is this business which really is what I called here this morning the second matter.

Remember you wanted me to do something like that either as an amendment to Judge Mansfield's July 1973 order or perhaps put it in the excessing order?

MISS SILVER: I think it is your point 2, your Honor.

THE COURT: That's right.

MISS SILVER: That you have already mentioned.

THE COURT: Yes.

MISS SILVER: We are perfectlyy willing to have it be in the excessing order, absolutely.

THE COURT: The reason I raised it the way I did is I think I misspoke when I was discussing that second issue, so-called, today. I really think that I should have said that it isn't the Board's or Mr. Bernikow's letter that prompts me to get into that, it is what I understand to be your position.

MISS SILVER: That is our motion of December 4, originally returnable the 14th.

THE COURT: My law clerk, Mr. Patterson, who is not here today, and I are perfectly capable, I guess, of sitting down and coming up with some marvelous language, but I was always taught to believe this was lawyers' work.

MR. BERNIKOW: Your Honor, may I say we would be perfectly happy, all parties, to submit a new order. One aspect that you did not mention in your four points which the Board is quite concerned with -- I really cannot express to you the depths of their concern -- is about the establishment of three pools, the A, B and C groups.

THE COURT: I think I know what you are going to say, but go ahead and say it again. You have said it before.

MR. BERNIKOW: Right, I have said it before. I have said it in my letter, and Mr. Arricale can back me up on that. We really think that is quite unnecessary, at least unnecessary polarization, particularly in view of the fact that we can represent to this Court that no one will be terminated, there will be very little movement, and that movement I can tell you will be from probably black districts to white districts, which would lead to a more integrated supervisory staff.

THE COURT: I know Mr. Arricale feels this way, and I know he feels this way with complete and, indeed,

utmost good faith. That has been clear all along. But I will tell you why I am not impressed. I don't want to be rude to him or to you in saying this, so please don't misunderstand me.

Basically this is what this suit is about. You can call it polarization. I would prefer not to. But I believe that because of the nature of this suit and the vindication which the plaintiff class has already received as a result of this suit and by orders of the Court in this suit to me it seems sort of impractical to say that the November 22nd three-pool provisions create any polarization.

Another thing that I believe, if there is going to be polarization it is going to come for reasons quite apart from this order.

But I will tell you what. If you and Mr. Arricale would be prepared to submit a proposed order to everybody involved here including what you think is a better way of proceeding than by the three pools, obviously I would consider it. I would be less than candid, however, if I did not say to you and through you to Mr. Arricale, this polarization argument has never impressed me as having any practical or legal effect, particularly given the nature of this case. He has to be sensitive to these things in a

city like ours. I know that. I don't want to ignore the thing, even though I have heard it before. So if you want to put something in that you think and he thinks is better, do so.

MR. BERNIKOW: Thank you, sir. We appreciate that.

MR. GREENWALD: Your Honor, if I may, on this question of the polarization of the groups, before the institution of this suit a large number of our membership --

THE COURT: Mr. Greenwald, tell me, are you for it, are you for me on this position, or are you for Mr. Arricale?

MR. GREENWALD: I am for Mr. Arricale, your Honor, but I would like the Court to know that over the last weeks we have been meeting with the black and Puerto Rican supervisors in the system whom we represent in overwhelming numbers. and they are now concerned that with this question of quotas plus other factors which are professionally occurring in this city that they are really receiving a license which is invisibly but indelibly stamped "black only."

THE COURT: Look, this is an open invitation to re-litigate this entire case, as I hear it. I am not about to do that.

MR. GREENWALD: No. I just wanted --

THE COURT: Look, Mr. Greenwald, you are a very articulate man. You have been very helpful. But I am not going to re-litigate this suit.

Let's stick to our knitting. If you want to support any proposals of the Board of Education you are at liberty to do so. But I would prefer you not to be giving me arguments like that four or five years after this suit started. There is no way it is going to do anything but antagonize the Court.

MR. GREENWALD: I understand that, your Honor, except that we weren't involved four or five years ago.

THE COURT: That is not my problem.

MR. GREENWALD: And at the beginning of this excessing, your Honor, Mr. Rebell nor Miss Silver talked about quotas. I think the problem with quota is about as difficult for all the parties to handle as it is for Mr. --

THE COURT: Mr. Greenwald, I repeat what I said. I have openly in Court endeavored to bring this wretched business to a final resolution and I feel aggrieved because I believe that unless I had done the drafting here we would be even worse off today than we already are. I will not countenance any more arguments, particularly when I have offered you and Mr. Bernikow and anybody else the

opportunity to submit precise proposals. That is enough of that.

MR. GREENWALD: The Court has been, there is no doubt, very very forceful and helpful in bringing the matter to the state we are. I just wanted to advise the Court, because maybe we weren't forceful enough in bringing it to the Court's attention, that the objects of the Court's protection, obviously at this point the undisputed objects, the black and Puerto Rican supervisors, are really concerned that its being given a "black only" license.

THE COURT: That is your contention. It isn't mine. I will put my civil rights credentials up against anybody's, particularly anybody in this case. I was in the business long before a lot of you were.

I don't take this lightly, having an order labeled a quota system, which I am not sure is a fair characterization, in any event.

I don't blame somebody outside the case assuming all kinds of fears and hopes, but I can't control that. We are lawyers. We are not rhetoricians solely.

You have an opportunity once again. I think its late already, but I am still willing to go along with another round. That is what I am offering you. Let's not

try to persuade me with a lot of rhetoric about what a lot of people outside the case think. I can't control that.

Mr. Rebell, what is your problem?

MR. REBELL: Your Honor, I am not going to take the Court's time to speak on the excessing issue, but the second item that you mentioned today, which we characterize as the automatic appointment issue, I came prepared to argue in terms of Miss Silver's motion, and I would submit that this is a very critical issue as far as the Community Boards are concerned. Because of our lack of intervenor status here, we have no opportunity to appeal this if it is entered into the order, and I would respectfully request that at the least we have an opportunity to fully argue and bring this matter before your consideration.

THE COURT: You see, Mr. Rebell, one of my problems is I don't find ever that this case is handled in any way that suits my understanding over the years of how law is practiced. I would suggest to you that I do not want argument this morning, because I am doing most of the drafting so far. Since I am flatly requiring and making available to Mr. Bernikow and the Board and the plaintiffs the opportunity to submit proposed modified orders, I will specifically say that you on behalf of

those Community Boards which you represent will have the opportunity to submit a letter or a memorandum, as you see fit, stating your views, once you see what they actually propose. My own problem is until I see it I am not going --

MR. REBELL: Your Honor, on this specific issue Miss Silver has submitted a proposed order and we have submitted a proposed counter-order and I think on that aspect its quite specific.

THE COURT: We don't have anything from the City Board.

MISS SILVER: Your Honor, there has been a welcome change since last time we addressed you on this issue, and the City Board -- I think Mr. Bernikow will confirm this -- has definitively stated that it joins with the plaintiffs on this issue and would acquiesce in the signing of the order we have submitted. So that if you did want to hear it today you wouldn't have to draft anything.

THE COURT: Wait a minute. You just said something very significant that I did not understand. I don't understand Mr. Bernikow to have said any such thing.

MISS SILVER: Maybe he will speak for himself.

THE COURT: You accept the plaintiffs' order?

MR. BERNIKOW: On the issue of the automatic appointment.

THE COURT: I beg your pardon.

MR. BERNIKOW: We have no opposition and we acquiesce in plaintiffs' --

THE COURT: All right. But this is only part of the job, and if I may say so, a small part of the job. I insist that I want a proposed order settled by the Board of Education. If you agree on certain points, hallelujah, I am all for it. It will be a rare and unexpected occasion, but I am all for it. But that doesn't defeat or diminish what I am trying to say to you people.

Just because the plaintiffs and the Board of Education agree, I still want to give Mr. Rebell a chance, even though he has not been allowed to intervene formally for this purpose. I am not going to stand on ceremony at this late date.

If you want to submit a memorandum or a letter you may.

MR. REBELL: Your Honor, perhaps there is some confusion on this issue, because we have submitted a detailed memorandum on this point.

THE COURT: I know you have, but I don't know, Mr. Rebell, what you are going to say about certain other

things that have not even been written yet.

MR. REBELL: To be frank, your Honor, I don't understand why this issue necessarily is tied into excessing.

THE COURT: I did not say it was. I am not the one who suggested this, Mr. Rebell. I know the plaintiffs want to do it that way. I know you have put in a memorandum about that. I am inviting you to go further if you care to. You may not.

I am hoping to get a comprehensive proposed amended order from the City of New York. I am inviting you to add anything you care to on the entire order.

You see what I am saying?

MR. REBELL: Yes, sir. I guess I am just --

THE COURT: I don't blame you for being confused because the way things have been going on, as usual, they are enough to confuse any rational person.

MR. REBELL: I think in the interests of the Court -- and perhaps plaintiffs would agree -- we could separate this issue out and settle it once and for all, because it clearly can be separated out.

But rather than further complicating that excessing issue at this point, we have two proposed orders here, I believe if we had argument and a decision was made --

THE COURT: We have two proposed orders, but I have been waiting, as you well know, for the Board of Education to speak. Mr. Bernikow, because of the pressure of business, on his own, or perhaps Mr. Arricale, I don't know, wasn't able to get anything to me until December 17. The Board of Education cannot be ignored.

MISS SILVER: Your Honor, if I may join with Mr. Rebell, I do think that the Board of Education as well as Mr. Rebell and the plaintiffs have treated this appointment issue as a separate issue, and you do have before you --

THE COURT: I don't deny it. What I am saying to you people, and I am not going to say it again, I am not about to get exercised about doing anything on this, even though it is perhaps a separate issue. I have understood that for a long time. You made this clear, for example, when you suggested that maybe it could be put as an amendment to Judge Mansfield's July order. All I am saying is experience in this case has made me very cautious. I want to see everything, because if I don't, almost of a certainty there will be some squeaks in writing and orally from somebody. I am not going to invest any more time than I have been forced to invest in this case already being exposed to that kind of thing.

Your papers are before the Court. I understand

Mr. Rebell. You are quite right. I know the memo you filed. I have it in front of me.

I am only saying I am not going to hear any more argument on that, I am not going to do anything else until I get a proposed order from Leonard Bernikow.

MR. BERNIKOW: Your Honor, on behalf of the Board of Education, I want to express its appreciation to you, and I want to tell you we will make every effort to see if we can agree among all parties to come in with one order on behalf of all of us.

THE COURT: It may well be, Miss Silver and Mr. Rebell, that this is a separate issue. I am not foreclosing you on that. I just don't want to get into it even as a separate issue until I see what he says in respect to everything else.

Now, as somebody pointed out, there are certainly two and probably three separate motions or applications. What have we ignored so far, Miss Silver?

MR. BERNIKOW: Your Honor, the three applications I had reference to, one was Miss Silver's application for the automatic appointment, and I really considered my letter two applications, one insofar as the administrative details and the second insofar as the pools. Those are my three motions that I had reference to.

THE COURT: All right. I think we have covered them, in other words.

MR. BERNIKOW: I think we have.

THE COURT: I just wanted to make sure we all agree.

Now, could we, to satisfy Mrs. Silver, because I think she probably is concerned, and if she is not I am -- what timetable would you propose, Mr. Bernikow?

MR. BERNIKOW: Your Honor, would the week of January 6th be too late? The reason I say that is today is the last day of school for a time and it might be difficult for us to get to our full clients.

THE COURT: And it is the holiday season and so on. I understand.

What I would like to suggest is if you could submit an order or a proposed order to be settled on notice, or if in the off chance you would agree -- that is too much to ask.

I would go along myself, subject to hearing from Mrs. Silver, with submitting that on the 6th. Is that what you had in mind?

MR. BERNIKOW: That's right.

THE COURT: You object to that, Miss Silver?

MISS SILVER: Your Honor, you mean for settlement

the 6th or notice the 6th for settlement the following week?

THE COURT: That is a good point. I was saying as long as he served and filed it on the 6th, if he settled it three days thereafter that would be fine.

MISS SILVER: That would be fine.

THE COURT: That is the usual New York rule, which we follow here, as I understand it.

Mr. Rebell, I think perhaps in fairness to you I should observe it may well be you are not going to be concerned about some of these other subjects that I, for example, ticked off as what I see as areas for possible clarification. Obviously if you are not, why, just call up Mr. Patterson and say "Look, I am still pressing only one thing, which the Judge already has the papers on," or if you still want to say something about the rest of this, even though you are not formally admitted, all right.

The same goes for you, Mr. Greenwald, although I assume your client will be pretty much in support of whatever the Board of Education comes up with.

MR. GREENWALD: I assume we will be consulted as far as the Court and the Board of Education. We were not party to the discussions between the parties a couple of days ago and I just heard about it this morning.

MR. BERNIKOW: Last night.

MR. GREENWALD: Last night. Obviously we will work towards an order that we think, frankly, will be both equitable and workable. We welcome that opportunity.

THE COURT: If you feel that you want to submit a letter or something, why, even though your client has not formally, I suppose, intervened for this purpose, I don't want to stand on ceremony with you either in that regard.

MR. GREENWALD: We have formally intervened for the purpose of excessing, your Honor.

THE COURT: I am so confused now, maybe you are right. I thought you had not.

MR. GREENWALD: We are an intervenor for the purpose of excessing and other relevant matters.

THE COURT: I stand corrected. I have gotten so used to you as being a full time participant that I had forgotten these technicalities.

MR. GREENWALD: Yes. I have been here five years, your Honor, the last year only with some legitimacy.

THE COURT: You came in shortly after I came in.

MR. GREENWALD: I was there before you, your Honor.

THE COURT: I know.

MR. GREENWALD: Yes, you permitted me to intervene for purposes of excessing and other matters related --

THE COURT: In any event, we got that clarified, so you know what to do without more.

MR. GREENWALD: Thank you, your Honor.

THE COURT: May I say with some trepidation that I hope you have a splendid holiday season, without any further disagreements until maybe later this month.

MR. BERNIKOW: Thank you very much.

MISS SILVER: Thank you.

(Adjourned.)

J 358a

Letter dated January 17, 1975, from Leonard Bernikow to Tyler, J.

The City of New York

MUNICIPAL BUILDING
NEW YORK, N. Y. 10007

ADRIAN P. BURKE, *Corporation Counsel*

January 17, 1975

Hon. Harold R. Tyler
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, N.Y. 10007

Re: Chance, et al., v. Board of Examiners, et al., 70 Civ. 4141

Dear Judge Tyler:

Although I had high hopes that we could submit an order on excessing which would be agreeable to all parties, I sincerely regret to inform you that we have been unable to reach that desired end.

I am therefore submitting a proposed order on behalf of the Board of Education. This order was discussed with the plaintiffs and they have indicated their opposition to it.

The Board of Education would find acceptable, although less desirable another order which has been discussed, only briefly with the plaintiffs.

That order would be identical to our present proposed order except that Paragraph III of the order would read as follows:

III. Excessing:

If a supervisor in Group B was eligible to take an examination prior to September 17, 1971 for a title in which he or she is now serving, his or her adjusted seniority for excessing purposes only, shall commence on the mean (mid-point) date of appointment from the list of the last examination in his or her title before September 17, 1971. The amount of time between the mean date of appointment of the particular list and September 17, 1971, is to be added to the number of years he has served in the title after September 17, 1971.

J 359a

Letter dated January 17, 1975, from Leonard Bernikow to Tyler, J.

I intend to submit further material in support of our order early next week.

Respectfully yours,

/s/

Leonard Bernikow
Assistant Corporation Counsel

CC:

Mrs. Frankel
Mr. Greenwald
Mr. Rebell
Mr. Cohen

J 360a

Defendant Board of Education's Notice of Settlement dated January 17, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (H.R.T.O

NOTICE OF SETTLEMENT

----------x

S I R S :

PLEASE TAKE NOTICE that the annexed order will be presented for settlement and signature on the 24th day of January, 1975, to the HOnorable HAROLD R. TYLER at the United States Courthouse.

Dated: New York, New York
January 17, 1975

ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007

By: /s/
Leonard Bernikow
ASsistant Corporation Counsel

Defendant Board of Education's Notice of Settlement
dated January 17, 1975

To:
JEANNE F. SILVER, ESQ.
Attorney for Plaintiffs
20 West 40 Street
New York, New York 10018

LEONARD GREENWALD, ESQ.
Attorneys for Intervenor,
Council of Supervisors and
Administrators of the City
of New York, Local 1, School
Administrators and Supervisors
Organizing Committee, AFL-CIO
80 Eighth Avenue
New York, New York 10011

REBELL and KRIEGER, ESQS.
230 Park Avenue
New York, New York 10017

SAUL Z. COHEN, ESQ.
KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER, ESQS.
425 Park AVenue
New York, New York 10022

Defendant Board of Education's Proposed Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

70 Civ. 4141 (H.R.T.)

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------x

Plaintiffs and defendant Board of Education having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Associa-

tion as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary order in respect to this matter on July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented, and the Court having made its findings on the record at the hearing on November 8, 1974:

IT IS HEREBY ORDERED:

This Court's Order of July 30, 1974 is rescinded and the following provisions shall govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system.

I. Definitions

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-the-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

II. Persons Affected by this Order:

J 364a

Defendant Board of Education's Proposed Order

A. The persons affected by this order shall consist of all persons occupying any supervisory position, whether on an acting or regular basis, in the New York City public school system as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into two groups. Group A will consist of all supervisors who were appointed before September 17, 1971, the date the preliminary injunction was issued in this case. Group B will consist of all supervisors who were appointed after September 17, 1971.

B. Any person otherwise qualified to be in Group A or B shall be excluded from the operation of this order, either;

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. If he does not hold a valid supervisory license as of the date he is to be excessed;

C. Any person otherwise qualified to be in Group A or B shall be excluded from the operation of this order if he or she shall volunteer in writing for a transfer. Such a person must submit a statement in writing that he or she voluntarily agrees to placement by the district in

another comparable vacancy within the district without regard to his or her excessing rights. Such a person must acknowledge the agreement in a notarized letter to the District Superintendent and the Executive Director of Personnel.

III. EXCESSING:

If a supervisor in Group B took and failed an examination prior to September 17, 1971, for the title in which he or she is now serving, his or her seniority, for excessing purposes only, shall commence on the mean (mid-point) date of appointment from the list of the examination he or she failed, provided he or she was eligible for appointment when the list was promulgated. The amount of time between the mean date of appointment of the particular list and September 17, 1971, is to be added to the number of years he has served in the title after September 17, 1971.

IV. REASSIGNMENT:

This order shall apply to excessed supervisors who as of the date of this order have not been assigned by their districts to comparable open vacancies which had existed in the home district.

According to the adjusted seniority rules, explained above in Paragraph III (Excessing) of this order, the districts will first place all of their own excessed supervisors in comparable existing vacancies within their own home districts.

Only those excessed supervisors for whom there are no comparable vacancies in the home districts are to be placed in the citywide excessing pool for placement by the Executive Director of Personnel into comparable existing vacancies in the System. No comparable vacancies are to be filled until all the members of the excessed pool are placed.

V. OVERSEER:

The Executive Director for Personnel of the Board of Education shall take all steps necessary to insure compliance with this order; shall require appointing authoities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements.

Defendant Board of Education's Proposed Order

VI. REPORTING:

The defendant Board of Education shall furnish to plaintiffs and the CSA copies of all instructions, directives, or circulars issued to any appointing authorities, their responsible officers, or other persons in respect to the excessing of supervisors. Any supervisor who is to be excessed shall be informed of his rights under this order and the data or computations on the basis of which defendants conclude that such excessing and transfers will comply with this order.

VII. DURATION:

This order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1977.

VIII. CONSTRUCTION:

To the maximum extent possible this order shall be construed consistently with all other relevant laws, contracts, policies, by-laws, and agreements. In particu- law, it shall not be construed to prejudice or limit the defendant's rights, if any, to create a preferred pool of excessed supervisors and/or to reassign or appoint them to vacancies wherever situated in the New York City public

school system. Further, this order shall not be construed to prejudice or limit the excessed supervisors' rights, if any, to return to vacancies in their home districts.

Dated: January , 1975

U.S.D.J.

Affidavit of James Regan, dated January 21, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JAMES REGAN, being duly sworn, deposes and says:

1. I am President of the Board of Education of the City of New York and I submit this affidavit in support of the proposed order submitted on behalf of the Board of Education and the Chancellor.

2. The aforesaid defendants believe that their order submitted on January 17, 1975, a copy of which is annexed hereto, is an appropriate means of dealing with the problem of excessing. Our order would avoid some of the administrative difficulties and other problems which would result from the order of this Court dated November 22, 1974.

3. The Board of Education order would compensate those supervisors who were subjected to examinations found by this Court to be unconstitutional because they were not job related.

4. The proposed order would provide that, for purpose of excessing, a supervisor who had taken and failed to pass an examination found by this Court to have been non-job related, would be given seniority as though he had passed and been appointed.

5. By definition excessing can apply only to supervisors who are now serving. Therefore, we are concerned with compensatory relief only for those supervisors who in fact were directly harmed because the pre-injunction examinations were not job related. These are the only supervisors who would require compensatory seniority in order to be protected against the effect of examinations held defective by this Court.

6. Pursuant to the terms of the November 22nd order the so-called plaintiff class is not only a continuously expanding class but also is much larger than when the suit was started despite the fact that non-discriminatory appointments have been made for almost four years. For example, a supervisor appointed in September, 1974 may have been ineligible to become a supervisor prior to September, 1971. It is therefore difficult to assume that he or she was harmed or discriminated against by an examination that may have been given in 1968 when he or she may have still been in school. The order being proposed by the defendants focuses on and compensates those individuals who can make a

claim of harm because they failed to pass the non-job related examination.

7. We believe that under applicable law that after the employing agency has in fact provided compensation to a group that has claimed discrimination then the necessary affirmative action requirements have been met. Thereafter those who came into the system in accordance with the job related requirements have no further claim to benefits in the nature of seniority which they could not possibly have been eligible for had the employment system been fully constitutional.

8. We believe, in addition, that whereas here defendants are proposing a compensatory remedy to those individuals who may have been adversely affected by non-job related examinations, this court should give deference to the plan submitted by the agency charged by law with the responsibility for administering the program.

9. The remedy proposed by defendants restricts the compensatory seniority to those individuals who met the educational and experience qualifications necessary for attainment of supervisory positions. It is to be noted that these educational and experience requeirements have not been held by this Court to be discriminatory or to have been complied with in a discriminatory manner.

Affidavit of James Regan, dated January 21, 1975

10. It would be unjust as well as creating many unnecessary problems in the administration of the public school system of the City of New York to require the implementation of an order which in effect grants seniority to some individuals which they could never have attained under a job-related supervisory examination system. Personnel administration and relations in this vast school system cannot ignore the structure developed by collective bargaining, by long practice of adherence to State Law requirements, employee morale and some assurance that career expectations will not be adversely affected by seniority arrangements which most employees of all ethnic groups will find difficult to understand. We think the proposed order is appropriate, fully compensatory and easy to administer.

11. Defendants had previously proposed an order which provided that any excessed supervisor would be placed in a preferred pool and no appointments would be made until that pool was exhausted. Defendants' present proposal, we believe, is specifically directed as a remedy designed to counteract the effects of the examining system invalidated by this Court. Defendants believe that both in the former proposal submitted by them and in the current proposal they have shown both their good faith and willingness to voluntarily address themselves to appropriate remedies in this

case designed to protect all individuals who might be adversely affected.

12. In addition, the November 22, 1974 order places great administrative burdens on the Division of Personnel of the Board of Education. Not only does it involve the Division of Personnel in intra-district excessing which hitherto has always been administered by the 32 districts but it also involves it in every proposed move.

13. The racial categories further compound the administrative difficulties, since each proposed move must be first checked for racial identification. Moreover, the requirement that the Executive Director of Personnel administer intra-district excessing rather than allowing the district to fill its vacancies first will greatly increase the number of excessed supervisors who must be placed in the excessing group.

JAMES REGAN

Sworn to before me this
21st day of January, 1975

JULIUS KAPLAN
Commissioner of Deeds
City of New York 2-1760
Certificate filed in Kings County
Commission Expires May 1, 1975

Julius Kaplan

J 374a

Letter dated January 23, 1975 from Michael A. Rebell to Tyler, J.

REBELL & KRIEGER
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MICHAEL A. REBELL
DENNIS C. KRIEGER

WESTCHESTER OFFICE
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(914) 949-5525

January 23, 1975

Honorable Harold R. Tyler
United States District Court
Southern District of New York
United States Court House
Foley Square, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

I am writing to convey the comments of amicus curiae New York City School Board Association concerning the proposed excessing order which has been noticed for settlement by defendant Board of Education on January 24, 1975. On behalf of our Community School Board members we would make the following points:

1. We believe that a paramount concern in a new excessing order must be a clarification of the fact that to avoid severe legal and administrative complications any new excessing system must be implemented initially on a district-wide basis; only when intra-district transfers cannot accomodate all excessed personnel should a city-wide implementation go into effect. We support Part IV of defendant's order to the extent that it clarifies this point. However we do not believe that it is necessary to delay the filling of city-wide vacancies and interfere with effective administration of the schools pending exhaustion of the excess pool as specified in the last sentence of Part IV since defendants' own statistics show that at any given moment numerous vacancies will exist on a city-wide basis. No such automatic delay in filling vacancies had ever been part of city-wide excessing rules.

2. The specific excessing system proposed by the defendants in Part III of their order appears to us to have serious problems in terms of administrative feasibility and effects on staff morale. The idea of granting members of

Letter dated January 23, 1975 from Michael A. Rebell to Tyler, J.

the plaintiff class increased seniority for excessing purposes only if they accept the stigma of public promulgation of their having failed a previous examination appears to be unreasonable. Even under defendants' proposed alternative system, serious questions arise concerning the feasibility of effecting complex individual seniority calculations imposing significant time delays which would impair effective administration of the schools.

We believe that the two other approaches to this problem which have been under discussion by the parties would be simpler and more effective than defendants' present proposal. These two alternate approaches would be either a) to grant all supervisors appointed since September 17, 1971 an automatic proportionate increase in the calculation of their seniority for excessing purposes or b) to revert to the approach contained in the Court's earlier excessing proposals, namely, requiring that excessing be effected in alternate order from lists of supervisors appointed before or after September 17, 1971.

3. We note that defendants have not attempted to include the so-called "automatic appointment" issue in the provisions of this order. We are informed, however, that the attorney for the plaintiffs intends to again ask the Court to include such a provision. As we have stated on previous occasions, we believe that this critical automatic appointment issue is not related to the immediate excessing problem and should not be considered in this context. Following the Court's suggestion on January 14, 1975, we have presented proposals to all the parties concerning certain specific modifications in the final wording of the permanent licensing plan. We believe that a resolution of the automatic appointment issue would most appropriately be accomplished in the context of anticipated further negotiations on the permanent licensing plan, to which it directly relates.

J 376a

Letter dated January 23, 1975 from Michael A. Rebell to Tyler, J.

Sincerely yours,

REBELL & KRIEGER
Attorneys for amicus curiae
New York City School Board
Association

By /s/ M. A. R.
Michael A. Rebell

MAR:st
cc: Jeanne R. Silver, Atty.
Elizabeth B. DuBois, Atty.
Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Leonard Greenwald, Esq.

J 377a

Letter dated January 24, 1975, from Jeanne R. Silver to Tyler, J.

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

January 24, 1975

Hon. Harold R. Tyler, Jr.
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

This letter is submitted in opposition to the defendant Board of Education's proposals for resettling the Court's November 22 Order with respect to the "excessing" of supervisory personnel and in support of plaintiffs' proposed counter-order submitted herewith.

As you are aware, plaintiffs viewed the Court's original order on excessing as lawful and appropriate but had agreed at the Board's request to confer with its representatives about alternatives which might be acceptable to all parties. It now appears that no such agreement is possible. Accordingly, our proposed counter-order adheres essentially to the Court's November 22 decree. In addition, it contains four modifications, described more fully in Exhibit "A" to this letter, which implement suggestions by the Court at the December 20th hearing, to alleviate administrative problems anticipated under the original decree because of the decentralized nature of the City's school system as well as to finally resolve the problem of regularizing the appointive status of newly licensed acting supervisors.

Plaintiffs' objection to the defendant's order is based on the complete absence of any guiding principle which would realize the objectives of the Court's November 22 decree and similar orders in other employment discrimination cases*. This Court's Order, "freezing" the application of seniority excessing rules at the point where the proportion of Blacks and Puerto Ricans excessed would exceed their present representation in the school system would have the dual purpose and effect of preventing perpetuation of wrongs

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* See Watkins v. United Steel Workers, 8 EPD para. 9766 (E.D. La. 1974) and Jersey Central Power and Light Co. v. IBW, 8 EPD, para. 9759 (D N.J. 1974).

to the plaintiffs and precluding resulting resegregation of the school supervisory staff. The defendant's proposed order affording limited and arbitrary seniority increments to a tiny fraction of plaintiffs' class, would achieve neither goal.

The sole thrust of defendant's proposal is to give a degree of incremental seniority to post-injunction appointees who failed examinations prior to issuance of the injunction. The increments would be measured by the numbers of years elapsed between a date related to the failed examination and the date of the preliminary injunction. There is nothing in this formula that would necessarily limit the impact of the seniority system on members of plaintiffs' class. There is no reason to believe that its application would prevent substantial reduction in the still relatively small representation of those groups in the supervisory service as a whole.

In fact, it appears that application of defendant's formula would have virtually no limiting effect on the impact of current seniority rules upon either the members of plaintiffs' class or post-injunction appointees generally. Plaintiffs have no independent source of information regarding the numbers of post-injunction appointees who failed pre-injunction tests and thus would be eligible for added seniority under defendant's plan. However, we have been advised by defendants that among a sampling of such personnel, only 3% would fall in the affected group.

Defendant rationalizes this complete departure from the Court's Order as an attempt to "compensate" people who sustained injury by virtue of the former unconstitutional examination system. Analysis of defendant's proposals indicates that it could not possibly serve that purpose:

1. The reach of defendant's proposal is too narrow. Plaintiffs' class as defined by the Final Judgment is not limited to people who took, failed or were eligible* for supervisory examinations before the

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* The alternative proposal, set forth in the covering letter of defendant's counsel, limiting the benefitted group to those who were "eligible" for an old examination would not cure this deficiency in the proposed order. The class was specifically defined by Judge Mansfield to include not only those who failed or were eligible to take examinations, but people who "failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination system to be discriminatory and unrelated to job performance." Chance v. Board of Examiners, (Opin. Mansfield, J. 5/21/73). That group cannot be assumed to have included only people who were eligible to take examinations. A much more likely inference is that many members, believing success on the tests impossible, avoided the onerous and expensive educational programs necessary to make them eligible. Moreover, it is clear that post-injunction appointees must include many who were not eligible for the unconstitutional tests, since current selection provisions in Special Circular 30 expressly permit people to apply for assignment to acting positions either if they meet eligibility requirements for the most recent appropriate supervisory examination or if they possess appropriate state certification.

Letter dated January 24, 1975, from Jeanne R. Silver to Tyler, J.

injunction. Indeed, Louis Mercado, one of the two named plaintiffs herein, who was recently licensed on the basis of on-the-job evaluations, never took a supervisory examination. And as noted, supra, it seems that almost none of the post-injunction employees fall into the limited group defendant seeks to "compensate."

2. There is no rational basis for defendant's proposed method of computing seniority. Since, as we have already pointed out, the fact of having failed an examination is immaterial to one's status as an injured plaintiff, it is inappropriate to use the mean date of appointment of successful examination takers as a starting date. The same must be said of the starting date in the defendant's "alternate" proposal.

It is equally inappropriate to use the date of the preliminary injunction as a cut-off. This assumes, contrary to fact, that individuals discriminated against were positioned to obtain immediate assignments to vacancies thereafter and may therefore be "docked" for the period until they actually received assignments. Under a different scheme than defendant's it might be appropriate to add to the earned seniority of post-injunction appointees uniform increments which would afford them parity with individuals having the same relative seniority within the pre-injunction group. In the context of defendant's proposal, the cut-off of seniority for all affected individuals at a uniform date defeats the compensation objective.

For the foregoing reasons, plaintiffs submit that the defendant's proposals are completely inappropriate substitutes for the Court's November 22 Order. They do not serve the remedial objectives of that decree, and their provisions for "compensating" members of plaintiffs' class would neglect the interests of many while affording limited and varying relief to others without a consistent standard.

Plaintiffs accordingly urge the Court to sign their proposed Order submitted herewith, continuing the purpose and Plan of the Court's November 22 Order and facilitating the administration thereof.

Sincerely yours,

Jeanne R. Silver
Attorney for Plaintiffs

JRS/mg

CC: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.
Leonard Greenwald, Esq.
Michael A. Rebell, Esq.

Exhibit A—Plaintiffs' Proposed Modification of November 22nd Order

Plaintiffs' Proposed Modification of November 22 Order

(References are to paragraphs in Plaintiffs' proposed counter-order submitted herewith)

1. The last sentence in Para. I.B would permit voluntary transfers within districts in disregard of the Order's excessing rules. The significant difference between this provision and that proposed at Para. II.C of defendant's proposed order is the requirement of consent to such transfer by the affected parent association, if any. We believe this provision, which is consistent with current requirements for consultation with parent associationson appointments pursuant to Special Circ. 30, is desirable to mitigate the impact of possible pressuresto transfer which might be imposed by appointing authorities interested in decreasing or increasing their excessing ratios. We have also amended the reporting provision (Para. VII) to include data on such transfers.

2. The last sentence of Para. II.C provides that licensure of acting personnel shall convert their assignments to "appointments" for all purposes, rather than only for excessing. The purpose—to eliminate uncertainty and litigation about a status left unclear in the Final Judgment—is discussed more fully in plaintiffs' letter of November 21, previously filed with the Court. At the last hearing on excessing, December 20, the defendant Board of Education affirmed that it joins in our request for this modification. We believe the New York City School Boards Association is mistaken in the claim that its members' state law appointment rights would be violated by the provision and that the issues discussed in its December 13 memorandum are therefore extraneous to this Court's jurisdiction.

3. Paras. III.B and C provide that the formula limitations on "excessing," and on intra-district reassignment by appointing authorities within their own jurisdictions, shall be determined by computing the ratios of Group B and C within each district rather than for the City as a whole. We believe these modifications are consistent both with the November 22 Order's purpose of maintaining gains in staff integration and the parties' desire, reiterated in Mr. Regan's affidavit supporting the defendant's proposed order, to decrease administrative burdens on the central authorities and unnecessary encroachment on the discretion of community boards.

4. Para. VII limits the Order's retroactive effect insofar as excessing but not reassignment provisions are concerned. This will minimize the necessity for community boards, restricted last July only from inter-district excessing, to revise intra-district reshufflings now. Change in prior personnel shifts will be necessary only if required to reabsorb individuals entitled to intra-district reassignment under the local ratio and Para. IV.A.

J 381a

Plaintiffs' Notice of Settlement dated January 24, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (H.R.T.)

NOTICE OF SETTLEMENT

- X

S I R S:

PLEASE TAKE NOTICE that the annexed counter order will be presented for settlement and signature on the 24th day of January, 1975, to the Honorable HAROLD R. TYLER at the United States Courthouse.

Dated: New York, New York
January 24, 1975

ELIZABETH B. DuBOIS
Legal Action Center of the
City of New York
271 Madison Avenue
New York, New York 10017
679-6502

JEANNE R. SILVER
20 West 40th Street
New York, New York 10018
255-6472

Attorneys for Plaintiffs

Plaintiffs' Notice of Settlement dated January 24, 1975

To: ADRIAN P. BURKE
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, New York 10007
Att: Leonard Bernikow

LEONARD GREENWALD, ESQ.
Attorneys for Intervenor,
Council of Supervisors and
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of New York, Local 1, School
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SAUL Z. COHEN, ESQ.
KAYE, SCHOLER, FIERMAN, HAYS
& HANDLER, ESQS.
425 Park Avenue
New York, New York 10022

Plaintiffs' Proposed Counter-Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Plaintiffs and defendant Board of Education having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, Board of Education, the "CSA" as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain further reports and held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented; and the Court having made its findings in the record at the hearing on November 8, 1974, and having issued an Order thereon dated November 22, 1974; and the Court having subsequently considered

certain administrative problems which defendant represented were entailed in implementing said Order; and the parties on January 24, 1975 having submitted counter proposals for modification thereof,

IT IS HEREBY ORDERED:

This Court's order of November 22, 1974, rescinding its prior Order of July 30, 1974 and setting forth provisions to govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system is modified to read as follows:

I. Definitions

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-the-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed, provided that if a supervisor who would otherwise be excessed pursuant to this definition volunteers in writing, after having been fully advised of his excessing rights hereunder, for placement in a comparable vacant position within the jurisdiction of the same appointing authority at the same or a higher level than that from which he

is removed, and he and the parents association of the school, if any, to which he is being transferred affirm in writing their assent to such placement, such supervisor's removal from his original position shall not be deemed an "excessing" as the term is used herein.

II. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position, whether on an acting or regular basis, in the New York City public school system as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into three groups. Group A shall consist of all Black supervisors. Group B shall consist of all supervisors of Puerto Rican or Latin American descent or origin. Group C shall consist of all supervisors not in Group A or Group B.

B. Any person otherwise qualified to be in Group A, B, or C shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed; and

b. he has failed to take or complete or has failed

the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

C. For purposes of implementing this order, the date of "appointment" of a supervisor not excluded from its operation shall be deemed to be the earlier of (1) the date on which he was appointed to his position or (2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendants. For all purposes, the licensure of an individual serving in an acting position pursuant to assignment in accordance with the applicable rules or regulations of the defendant shall also constitute his appointment effective as of the date of his assignment.

D. A person occupying a supervisory position shall not be excessed until the results of his examination or re-examination have been evaluated if

1. he has not had an opportunity to take or complete an examination for a supervisory license, although he has been assigned to a supervisory position for more than five months and is eligible for on-the-job evaluation; or

2. he is in the process of taking an examination or re-examination for a supervisory license; or

3. the results of his examination or re-examination have not been evaluated,

unless he could be excessed even if he held a supervisory license valid as of the date of his original assignment to a supervisory position.

III. Excessing:

A. The total number of supervisors shall be calculated separately for Group A(A), for Group B(B), and for Group C(C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups (A+B+C). The proportion that A bears to the total (A+B+C) shall be calculated (A/(A+B+C)). The proportion that B bears to the total (A+B+C) shall be calculated (B/(A+B+C)).

B. As of the date that supervisory positions are to be terminated within the jurisdiction of any appointing authority the total numbers of supervisors in Groups A (A'), B (B') and C (C') respectively within such jurisdiction shall be separately calculated. These numbers shall be totalled for each jurisdiction (A'+B'+C'). The proportion that A' and B' respectively bear to (A'+B'+C') shall be calculated as to each jurisdiction in which terminations are anticipated.

C. The number of supervisors in Group A' who are to be excessed at any time by an appointing authority divided by the total number of supervisors in Groups A', B' and C' who are to

be excessed at that same time shall not exceed A'/(A'+B'+C'). The number of supervisors in Group B' who are to be excessed at any time by an appointing authority, divided by the total number of supervisors in Groups A', B' and C' who are to be excessed at that same time shall not exceed B'/(A'+B'+C').

IV. Reassignment:

A. If persons from Group A', Group B', or Group C' who have been excessed by an appointing authority are reassigned by such authority to appropriate supervisory vacancies under its jurisdiction, such reassignment shall be done

1. in such a manner that (A'+B')/(A'+B'+C') within the jurisdiction of such authority does not decrease unless there are no excessed supervisors from Group A' or Group B' available for reassignment; and

2. in such a manner that A'/(A'+B'+C') within the authority's jurisdiction does not decrease unless there are no excessed supervisors from Group A' available for reassignment, provided, however, that the ratio may decrease to A'/(A'+B'+C'+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group B'; and

3. in such a manner that B'/(A'+B'+C') does not decrease unless there are no excessed supervisors from Group B' available for reassignment, provided, however that the ratio may decrease to B'(A'+B'+C'+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group A'.

Plaintiffs' Proposed Counter-Order

B. If persons from Group A, Group B, or Group C who have been excessed out of the jurisdiction of an appointing authority are reassigned by the defendant Board of Education or Chancellor to appropriate supervisory vacancies such reassignments shall be done

1. in such a manner that (A+B)/(A+B+C) in the City supervisory service as a whole does not decrease, unless there are no excessed supervisors from Group A or Group B available for reassignment; and

2. in such a manner that A/(A+B+C, does not increase unless there are no excessed supervisors from Group A available for reassignment, provided, however, that the ratio may decrease to A/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group B; and

3. in such a manner that B/(A+B+C) does not decrease unless there are no excessed supervisors from Group B available for reassignment, provided, however, that the ratio may decrease to B/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group A.

V. Overseer

The Executive Director for Personnel of the Board of

Education shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements.

VI. Reporting:

The defendant Board of Education shall furnish to plaintiffs and the CSA copies of all instructions, directives, circulars, or orders issued to any appointing authorities, their responsible officers, or other persons in respect to the excessing of supervisors. No later than 15 days prior to the effective date of any excessing decisions or orders, the Board shall report to plaintiffs and the CSA the name and Group of all personnel to be excessed or transferred in lieu of excessing, the positions from which they will be excessed or transferred, positions to which they will be transfereed, if any, and data or computations on the basis of which defendants conclude that such excessing and transfers will comply with this order.

VII. Duration:

This order shall be fully effective prospectively until November 30, 1977, and except for the provision of paragraph III C. above, retroactively to July 30, 1974.

VIII. Construction:

J 391a

Plaintiffs' Proposed Counter-Order

To the maximum extent possible this order shall be construed consistently with all other relevant laws, contracts, policies, by-laws, and agreements. In particular, it shall not be construed to prejudice or limit the defendant's rights, if any, to create a preferred pool of excessed supervisors and/or to reassign or appoint them to vacancies wherever situated in the New York City public school system. Further, this order shall not be construed to prejudice or limit the excessed supervisors' rights, if any, to return to vacancies in their home districts.

Dated:

_____

U.S.D.J.

Letter dated January 27, 1975, from Leonard Greenwald to Tyler, J.

LAW OFFICES
FRANKLE & GREENWALD

MAX H. FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011
(212) 242-0200

January 27, 1975

Hon. Harold R. Tyler
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al. vs. Board of Examiners et al.
70 Civ. 4141

Dear Judge Tyler:

It is with regret that I must inform the Court that my client, the CSA, has instructed me not to take any position on any of the orders pending before the Court. However, this should not be construed as meaning that we approve of any or all of the orders.

Events, including the last futile attempts to reach a compromise, have convinced the CSA that there is in fact less than a genuine desire to reach an order on excessing which is tailored both to the needs of the problem and the educational system.

The CSA has previously expressed its opinion as to the political motivations behind plaintiffs' positions. I respectfully call the Court's attention to the affidavit of Mr. Saul Z. Cohen dated January 13, 1975. At the present stage, it is virtually clear that none of plaintiff's class would be affected by excessing.

The Court of Appeals in its decision (see 49 U.S. FRD. 2d 825) warned about a situation in which plaintiffs' class might acquire interests hostile to and destructive to a non-discriminatory testing system. We believe that in fact has happened. A majority of the minority group supervisors now serving reject the "remedy" being made available to them. They have in meeting after meeting advised their collective bargaining representative, the CSA, that they professionally and morally reject the professional apartheid that the proposed order creates.

COPY

Letter dated January 27, 1975, from Leonard Greenwald to Tyler, J.

For these reasons and reasons previously expressed, we cannot join in nor endorse any of the proposed orders.

Respectfully yours,

/S/

LEONARD GREENWALD

LG:bsw

cc: Jeanne R. Silver, Esq.
Leonard Bernikow, Esq.
Michael A. Rebell, Esq.
Saul Z. Cohen, Esq.

J 394a

Letter dated January 31, 1975, from Leonard Greenwald to Tyler, J.

LAW OFFICES
FRANKLE & GREENWALD

MAX H. FRANKLE
LEONARD GREENWALD

80 EIGHTH AVENUE, NEW YORK, N.Y. 10011
(212) 242-0200

January 31, 1975

Hon. Harold R. Tyler
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance et al. vs. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

I respectfully call the Court's attention to the recent decision of the United States Court of Appeals for the Second Circuit in Jersey Central Power and Light Company. I understand that the decision came down on January 30, 1975, and no official citation is yet available.

In Jersey Central, the Court of Appeals reversed a District Court order which required that layoffs among production and maintenance employees be carried out in such a way as to preserve minority group and female employee ratios. The ratios had been established under a conciliation directive of the Equal Employment Opportunity Commission.

In setting aside the excessing mandate, the Appeals Court noted that, despite the "disproportionate effect" on minority group and female employees, the collective bargaining provisions "must govern . . . ." The above decision is particularly relevant in our situation, since it is quite apparent that less than five percent of the Circular 30 acting supervisors did not prior to November 1970 meet the eligibility requirements for their respective supervisory examinations. Less than one percent of the current Circular 30 minority group supervisors took and failed any supervisory examination.

Respectfully yours,

LEONARD GREENWALD

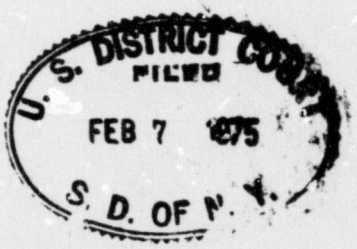
LG:bsw
cc: Leonard Bernikow, Esq.
Jeanne R. Silver, Esq.
Michael Rebell, Esq.

COPY

J 395a

Memorandum Decision of Tyler, J., dated February 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



[SAME TITLE]

TYLER, D.J.

Contemporaneously herewith, this court is filing an order designed to finally resolve the so-called "excessing issue", which has been the subject of many hearings and arguments before the court since July, 1974.

In fairness to the parties and counsel, it perhaps should be observed that the undersigned is and has been aware of the relatively recent cases dealing with the issue of fashioning decrees, pursuant to Title VII of the Civil Rights Act of 1964, which protect minorities in lay-off situations. See Waters v. Wisconsin Steel Works, Inc., 502 F.2d 1309 (7th Cir. 1974), and Jersey Central Power & Light Co. v. Electrical Workers Local 327, _____ F.2d _____, (3d Cir. decided January 30, 1975). Although counsel here have not briefed these cases or referred to them, I have considered them before filing the so-called final "excessing" order or decree today.

Arguably, the reasoning of those cases is inapposite here because (1) the facts are somewhat different and (2) this case is not based upon Title VII of the 1964 Act. But it does involve 42 U.S.C. § 1981 which has

Memorandum Decision of Tyler, J., dated
February 7, 1975

a different legislative history. See Watkins, infra. Nonetheless, such reasoning might be said to be generally applicable here. If the latter view were taken, I note my disagreement therewith. Specifically, I believe that the better view in support of the excessing order here is to be found in such recent authorities as Watkins v. United Steelworkers Local 2369, 369 F. Supp. 1221 (E. D. La., 1974), appeal docketed, No. 74-2604 (5th Cir., June 17, 1974). Moreover, I am inclined to think that the Court of Appeals for this circuit has already adopted a different view of racial quotas under Title VII than that of the Third and Seventh Circuits. See, e.g., Rios v. Enterprise Ass'n Steamfitters Local 638, 501 F. 2d 622 (2d Cir. 1974). Aside from the fact that I personally find the rationale of this circuit to be more persuasive, this court is bound to follow it in any event.

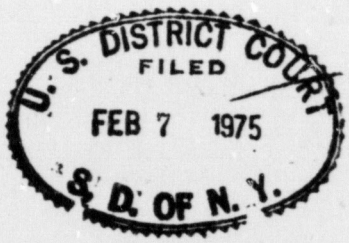
Dated: February 7, 1975

/s/ R. Tyler, Jr.
U.S.D.J.

J 397a

Order of Tyler, J., dated February 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



[SAME TITLE]

Plaintiffs and defendant Board of Education (hereinafter "defendant") having appeared before this Court to request certain rulings regarding the continued applicability of "excessing" regulations set forth in an agreement between said defendant and the Council of Supervisors and Administrators of the City of New York, Local 1, School Administrators and Supervisors Organizing Committee, AFL-CIO, (hereinafter "CSA"), and plaintiffs having urged that continued implementation of such rules, or any rules which would have a discriminatory impact on the "acting" supervisors assigned pursuant to this Court's orders, would be inconsistent with the Court's decisions herein, and plaintiffs having proposed an alternative approach to the excessing of supervisory personnel, and the defendant, the CSA as Intervenor, and the New York City School Boards Association as amicus curiae, having each proposed certain modifications in existing rules, and the Court having issued a preliminary Order in respect to this matter on July 30, 1974, and the Court having received certain further reports and

Order of Tyler, J., dated February 7, 1975

held further hearings thereon at which the parties, the Intervenor and amicus curiae were represented; and the Court having made its findings in the record at the hearing on November 8, 1974, and having issued an Order thereon dated November 22, 1974; and the Court having subsequently considered certain administrative problems which defendant represented were entailed in implementing said Order; and the parties on January 24, 1975 having submitted counter proposals for modification thereof,

IT IS HEREBY ORDERED:

This Court's order of November 22, 1974, rescinding its prior Order of July 30, 1974 and setting forth provisions to govern the intra-district and inter-district excessing of supervisory personnel in the New York City school system is clarified and modified to read as follows:

I. Definitions

A. As used herein, the term "examination" includes any examination authorized by paragraph III of the Final Judgment in this case, not excluding on-the-job evaluations.

B. As used herein, "excessing" means the removal of a supervisor from a position in which he is serving as a result of the abolition of such position or another position at the same or a higher level than that from which he is removed.

Order of Tyler, J., dated February 7, 1975

II. Persons Affected by this Order:

A. The persons affected by this order shall consist of all persons occupying any supervisory position, whether on an acting or regular basis, in the New York City public school system (or, where appropriate for the purposes of this order, within the jurisdiction of the relevant appointing authority) as of the date that any supervisory position is to be terminated. Such supervisors shall be divided into three groups. Group A shall consist of all Black supervisors. Group B shall consist of all supervisors of Puerto Rican or Latin American descent or origin. Group C shall consist of all supervisors not in Group A or Group B.

B. Any person otherwise qualified to be in Group A, B, or C shall be excluded from the operation of this order, either:

1. if he has been assigned or appointed to a supervisory position for less than five months as of the date he is to be excessed from a position; or

2. if

a. he does not hold a valid supervisory license as of the date he is to be excessed; and

b. he has failed to take or complete or has failed the appropriate licensing examination or re-examination after adequate notice and, in the case of a first examination, during a period in which he had the opportunity to take or complete the appropriate examination.

Order of Tyler, J., dated February 7, 1975

C. For purposes of implementing this order, the date of appointment of a supervisor not excluded from the operation of this order shall be the earlier of: (1) the date on which he was appointed to his position, and (2) the date on which he was assigned thereto pursuant to then applicable rules or regulations of the defendant. Such date shall constitute the date of appointment for such supervisors for all purposes, and the appointment shall have the same effect as it would have were it made in accordance with the law, rules, and procedures which were applicable before court orders in this case enjoined their application; provided that if the appropriate appointing authority notifies such supervisor and the Director of Personnel of the Board of Education, in a written certificate and within forty-five (45) days after such supervisor has received a supervisory license or within forty-five (45) days after the date of this order, whichever is later, that the appointing authority did not intend to appoint the supervisor when it assigned him and that it does not now wish to appoint him permanently, then he shall be considered appointed only for the purposes of implementing this order. Failure of the appointing authority to so act within the requisite forty-five (45) day period shall constitute automatic appointment. This subparagraph shall not be construed to deny the appointing authority's or the supervisor's rights, if any, to enter into employment contracts pursuant to N. Y. Ed. Law § 2573.

Order of Tyler, J., dated February 7, 1975

D. A person occupying a supervisory position shall not be excessed until the results of his examination or re-examination have been evaluated if

1. he has not had an opportunity to take or complete an examination for a supervisory license, although he has been assigned to a supervisory position for more than five months and is eligible for on-the-job evaluation; or

2. he is in the process of taking an examination or re-examination for a supervisory license; or

3. the results of his examination or re-examination have not been evaluated,

unless he could be excessed even if he held a supervisory license valid as of the date of his original assignment to a supervisory position.

III. Excessing:

A. The total number of supervisors shall be calculated separately for Group A(A), for Group B(B), and for Group C(C) as of the date that any supervisory position is to be terminated. These numbers shall be totalled for all groups (A+B+C). The proportion that A bears to the total (A+B+C) shall be calculated (A/(A+B+C)). The proportion that B bears to the total (A+B+C) shall be calculated (B/(A+B+C)).

B. The number of supervisors in Group A who are to be excessed at any time divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed A/(A+B+C). The number of supervisors in Group B who are to be excessed at any time

Order of Tyler, J., dated February 7, 1975

divided by the total number of supervisors in Groups A, B, and C who are to be excessed at that same time shall not exceed B/(A+B+C).

C. For purposes of intra-district excessing within the jurisdiction of an appointing authority, these numbers and ratios shall be calculated on the basis of the numbers of supervisors then acting under the jurisdiction of that appointing authority and shall be applied to all intra-district excessing within the district of that appointing authority. Such intra-district excessing shall be administered by each appointing authority, subject to the duties of paragraph V herein and subject to the reporting requirements of paragraph VI herein.

D. For purposes of inter-district excessing from the jurisdiction of one appointing authority to the jurisdiction of another appointing authority, these numbers and ratios shall be calculated on the basis of the number of supervisors acting throughout New York City and shall be applied to all inter-district excessing. Such inter-district excessing shall be administered by the Executive Director for Personnel of the Board of Education, subject to the duties of paragraph V herein and subject to the reporting requirements of paragraph VI herein.

Order of Tyler, J., dated February 7, 1975

E. Any supervisor in Group A, B, or C who volunteers in writing, after having been fully advised of his excessing rights under this order, to be transferred from a supervisory position in one district to a comparable supervisory position in the same district or in another district shall not be considered excessed for purposes of this order; provided, however, that the new position is expected to continue in existence for at least one (1) year from the date of the transfer. Each appointing authority shall administer all voluntary intra-district transfers within its jurisdiction subject to the duties of paragraph V herein and the reporting requirements of paragraph VI herein. The Executive Director for Personnel of the Board of Education shall administer all voluntary, inter-district transfers from one district to another, subject to the duties of paragraph V herein and the reporting requirements of paragraph VI herein.

IV. Reassignment:

If persons from Group A, Group B, or Group C who have been excessed are reassigned to appropriate supervisory vacancies, such reassignments shall be done

A. in such a manner that (A+B)/(A+B+C) does not decrease unless there are no excessed supervisors from Group A or Group B available for reassignment; and

Order of Tyler, J., dated February 7, 1975

B. in such a manner that A/(A+B+C) does not decrease unless there are no excessed supervisors from Group A available for reassignment, provided, however, that the ratio may decrease to A/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group B; and

C. in such a manner that B/(A+B+C) does not decrease unless there are no excessed supervisors from Group B available for reassignment, provided, however, that the ratio may decrease to B/(A+B+C+1) if the increase in the size of the denominator results from the reassignment of an excessed supervisor from Group A.

V. Overseers:

A. With respect to all inter-district excessing, associated inter-district transferring, and inter-district reassigning, the Executive Director for Personnel of the Board of Education shall take all steps necessary to insure compliance with this order; shall require appointing authorities to supply all information necessary to execute this order; and shall require appointing authorities to act in whatever manner is necessary to execute this order, provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements.

J 405a

Order of Tyler, J., dated February 7, 1975

B. With respect to all intra-district excessing, associated intra-district transferring, and intra-district reassigning, one person shall be designated as its overseer by each appointing authority and the person so designated (hereinafter "designee") shall take all steps necessary to insure compliance with this order; shall require schools and any other relevant subdivisions of the appointing authority to supply all information necessary to execute this order; and shall require schools and any other relevant subdivisions to act in whatever manner is necessary to execute this order; provided, however, that he complies to the maximum extent possible with all other relevant laws, contracts, policies, by-laws, and agreements. The Executive Director for Personnel of the Board of Education shall be responsible for insuring that each designee is making a good faith effort to comply with this order and is complying with this order. If he is not satisfied that a designee is so acting, the Executive Director shall, in his discretion: (1) order the designee to act in any way necessary to execute this order, (2) replace the designee with a person of his choice until the appointing authority designates a new designee, or (3) assume the designee's duties himself until the appointing authority designates a new designee.

Order of Tyler, J., dated February 7, 1975

VI. Reporting:

A. The defendant shall furnish to plaintiffs and the CSA copies of all instructions, guidelines, directives, circulars, or orders issued to any appointing authorities, their responsible officers, or other persons in respect to the inter-district excessing, voluntary transferring, or reassigning of supervisors. No later than fifteen (15) days prior to the effective date of any excessing, transferring or reassigning decisions or orders, the defendant shall report to plaintiffs and the CSA the name and Group of all supervisory personnel affected, the positions which they will leave, the positions to which they will be transferred or reassigned, if any, and data or computations on the basis of which defendant concludes that such excessing, transferring, or reassigning will comply with this order.

B. Each designee shall furnish to plaintiffs, the Executive Director of Personnel, and the CSA copies of all instructions, guidelines, directives circulars, or orders issued by himself or his appointing authority, its responsible officers, or other persons respecting the intra-district excessing, voluntary transferring, or reassigning of supervisors. No later than fifteen (15) days prior to the effective date of any excessing, transferring, or reassigning decisions or orders, each designee shall report to plaintiffs, the Executive

Order of Tyler, J., dated February 7, 1975

Director, and the CSA the name and Group of all supervisory personnel affected, the positions which they will leave, the positions to which they will be transferred or reassigned, if any, and data or computations on the basis of which the designee concludes that such excessing, transferring, or reassigning will comply with this order.

VII. Duration:

This order shall be effective retroactively to July 30, 1974, and prospectively until November 30, 1977; provided, however, that this order shall not apply to any intra-district excessing, transferring, or reassigning which occurred before November 22, 1974.

VIII. Construction:

To the maximum extent possible, this order shall be construed consistently with all other relevant laws, contracts, policies, by-laws, and agreements. In particular, it shall not be construed to prejudice or limit the defendant's rights, if any, to create a preferred pool of excessed supervisors and/or to reassign or appoint them to vacancies wherever situated in the New York City public school system. Further, this order shall not be construed to prejudice or limit the excessed supervisors' rights, if any, to return to vacancies in their home districts.

Dated: February 7th, 1975

W. C. Tyler, Jr.
U.S.D.J.

J 4088

Intervenor's Notice of Appeal dated February 28, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Notice is hereby given that the Intervenor, COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO, hereby appeals to the United States Court of Appeals for the Second Circuit from the order entered in this action on the 7th day of February 1975, clarifying and modifying the order of November 22, 1974, which rescinded the Court's order of July 30, 1974, and thereby modifying, revising, and rescinding the procedures governing the excessing of supervisory personnel in the New York City school system, as theretofore established by statute, by-laws, and collective bargaining agreements. This appeal is from each and every part of such order.

Dated: February 28, 1975

Intervenor's Notice of Appeal dated February 28, 1975

FRANKLE & GREENWALD

By /s/
Leonard Greenwald
Attorneys for Intervenor,
Council of Supervisors and Administrators of the City of New York,
Local 1, SASOC, AFL-CIO
80 Eighth Avenue
New York, New York 10011
(212) 242-0200

TO:
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SAUL Z. COHEN, ESQ.
Attorney for Board of Examiners
425 Park Avenue
New York, New York 10022

MICHAEL REBELL, ESQ.
Attorney for Amicus Curiae
19 Rector Street
New York, New York 10006

J 4103

Defendant Board of Education's Notice of Appeal dated March 4, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

NOTICE OF APPEAL

70 Civ. 4141 HRT

S I R S:

NOTICE IS HEREBY GIVEN that defendants, The Board of Education of The City of New York and Irving Anker as Chancellor thereof, hereby appeal to the United States Court of Appeals for the Second Circuit from the order entered herein on or about February 7, 1975 which modified the order of this Court of November 22, 1974 regarding excessing.

Dated: New York, N.Y.
March 4, 1975

W. BERNARD RICHLAND
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By /s/
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J 4118

Defendant Board of Education's Notice of Appeal dated March 4, 1975

TO:

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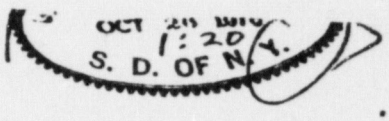
J 4128

Opinion of Mansfield, J., filed October 26, 1970

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



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BOSTON M. CHANCE and LOUIS C. MERCADO, individually and on behalf of all others similarly situated,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

- -x

37146

70 Civ. 4141

APPEARANCES

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MANSFIELD, D.J.

In this suit challenging the procedures and tests required by the Board of Education to obtain a permanent appointment to supervisory positions within the New York City public school system, the Council of Supervisory Associations of the

Opinion of Mansfield, J., dated October 26, 1970

Public Schools of New York City (hereinafter "CSA") seeks to intervene. For the reasons discussed below, this motion is denied.

The CSA seeks intervention as of right, under Rule 24(a)(2), which provides:

> "Upon timely application anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

Plaintiffs are two acting principals of public schools in New York City. Each has qualified under New York State law for the position of principal and holds a New York State certificate. However, in order to qualify for permanent appointment to the position of principal in New York City each is presently required to obtain a New York City license in addition to his state license. A New York City license is issued by the Board of Education of New York City only to those who pass certain tests and examinations prepared and administered by the Board of Examiners. If plaintiffs fail to pass these tests they will be barred from appointment as permanent principals in New York City even though their state licenses would qualify them for appointment outside of New York City.

Plaintiffs attack the New York City testing procedures

on various grounds, the principal of which are that they are biassed against black people and Puerto Ricans and that the procedures are unrelated to the functions of the supervisory positions for which the tests are given.

CSA is the collective bargaining agent for supervisory personnel, including principals, who have already become eligible for appointment. CSA represents them in negotiations with respect to such important matters as salaries, welfare benefits, pensions, retirement program, working conditions, leaves of absence, grievance procedures and the like. It does not appear to have been authorized to represent or negotiate on behalf of any members with respect to examinations for licenses as principals, testing procedures for such offices, or the like. Nor does it appear that it has ever done so. Indeed, since its members have all qualified under the existing New York City testing and examination requirements here under attack, they would not appear to have any personal interest in changing or relaxing the requirements for new applicants. In short, CSA's function and activities on behalf of its members commenced after its members have become eligible for regular membership in its constituent organizations by qualifying for licenses as supervisory employees or members, and not before.

Since plaintiffs' motion for a preliminary injunction,

if granted, will only affect future examinations and the hiring of future personnel, the members of the CSA do not have an "interest" in the subject matter of the Chance action of a type entitling them to intervene pursuant to Rule 24(a)(2). They have already secured their positions and the Chance suit, whatever its disposition, will not affect them. Moreover, the CSA has shown us no reason to assume that it has any express or implied authority to represent its members in the Chance suit. Nothing in the labor agreement between the Board of Education of the City of New York and the CSA indicates the existence of any such authority and we have not been shown any valid reason why CSA should represent its members in matters relating to the testing procedures of future supervisory personnel.

CSA relies on only three cases to support its view; all are inapplicable. In Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), the court allowed the State of California and Southern California Edison Co. to intervene and oppose a Government consent decree in an antitrust action. California, the court noted, is a state where the antitrust offender, El Paso, sold most of its gas; and California was vitally concerned that the consent decree would not restore competition for the gas that it and its citizens purchased. See id. at 132, 135. Southern Edison was a large industrial user of natural gas

purchased from El Paso's sources. The interest of CSA in no way approaches the interest of the interveners in the El Paso case.

Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502 (1941), also cited by CSA, was discussed by the court in El Paso. A security holder of a company which was supposed to be protected by a consent decree was allowed to intervene on the company's behalf. Not only did the security holder have a real interest in the litigation, but the court noted the special circumstances that intervention was needed to protect the private party in the enforcement of the public law, and that the foundation of the intervention was not Rule 24(a) of the Federal Rules but rather the peculiar provisions of the consent decree. Id. at 506.

Finally, CSA relies on United States v. Simmonds Precision Products, Inc., 67 Civ. 4506 (S.D.N.Y. June 30, 1970), where the court permitted a labor union to intervene for the purpose of opposing the entry of a final judgment on a consent decree in an antitrust case. CSA neglects to mention that the court's opinion clearly states that the union sought intervention in order to protect the job security of its members. Id. at 3. As we noted earlier, there is no danger to the job security of the CSA members if the Chance plaintiffs would be successful in their suit.

Opinion of Mansfield, J., dated October 26, 1970

Even if CSA had a legal interest in the subject matter of the Chance dispute, we would still be required to deny their motion to intervene because we find that CSA's alleged interest will be more than adequately represented by existing parties. Plaintiffs have served process in this suit upon the Board of Examiners and its members -- individually and in their capacities as members of the Board. The Board is retaining independent counsel to defend the suit. CSA has given us no valid reason for believing that counsel retained by the Board of Examiners will not be able competently to defend this suit.

It is so ordered.

Walter R. Mansfield
U.S.D.J.

Dated: October 26, 1970.

J 4181

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE
LOUIS C. MERCADO, et al,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and
THE BOARD OF EDUCATION OF
THE CITY OF NEW YORK, et al,

Defendants.

70 CIV. 4141

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM
REGARDING APPLICATION OF EXCESSING RULES

FILED
SEP 25 PM '74
S.D. OF N.Y.

Introduction

This memorandum is submitted in continuing objection to defendant Board of Education's proposal regarding the "excessing" of supervisory personnel.

Under the proposal, defendant would extend traditional seniority rules to supervisors assigned as "actings" under the temporary hiring provisions established pursuant to the decrees in this case, using date of assignment to measure relative seniority, provided the personnel had been "licensed" following successful participation in interim evaluation procedures and also formally "appointed." This would protect covered individuals, only, from transfer from their districts, demotion or dismissal except in order of inverse seniority relative to each other and all the persons ever appointed before the preliminary injunction in this case. Seniority of the latter group would continue to be measured by date of appointing, thus making all of them senior to all covered persons appointed pursuant to this Court's decrees.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

When defendant first submitted this proposal, in July 1974, plaintiffs argued that it would unconstitutionally perpetuate the effects of past discrimination by assuring that people appointed under the remedial provisions in this case and particularly minorities, would be displaced from their present jobs and in many cases, dismissed from the system. (Pltfs' Memo. July 25, 1974). Defendant maintained that few personnel would be affected and, without clarifying the status of the uncovered individuals, that none would be dismissed.[1] (Aff. Frank C. Arricale July 30, 1974 par. 5, 8, 9). The Court thereupon declined to grant permanent injunctive relief requested by the plaintiffs but issued a temporary stay pending review of specific data to be submitted by defendant on the potential effects of its plan. (Order July 30, 1974)

Defendant has failed to submit a substantial portion of the data required by the Court--specifically that which would show the precise impact of position shifts on individuals of different race or ethnic group. (See Order July 30, par. II.B) The general list of vacancies available which it has furnished leaves us to speculate, for example, on just how a large group of people in the title "assistant principal" DES would be reassigned, and the alternative positions to which many might have to be transferred given the much lower number of vacancies than abolitions for this position. This is very significant in view of their claim that inter-district excessing is really not detrimental to affected individuals.

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1. Defendant also maintained that its plan would tend to improve school system staff integration by dispersing minority personnel excessed from "minority" districts with enrollment decline to high enrollment districts with predominantly white and presumptively discriminatory school boards. This contention, for no element of which there is any prior basis in the record, is contradicted by the data actually submitted on district staff surplus and school enrollment decline.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

The data defendant has submitted, nevertheless belies the alleged innocuous character of its excessing proposal and bears out everyone of plaintiffs' contentions regarding its discriminatory impact.

Defendant's plan would affect 63 people, not 25 or so as it originally contended. (Arr. aff. July 30, 1974) Although defendant does not so state, they are necessarily all people appointed pursuant to this Court's remedial orders. Seventeen or 18, approximately 27%, are Blacks or Hispanics.

Of these 63 affected people, it is now projected that 35 would be shifted to different positions. Despite defendant's failure to furnish precise data, referred to above, it is clear from comparison of positions and vacancies described and their relative numbers that many of these assignments would entail change in the character of position held, and possible demotion. Thus, they cannot be termed innocuous.

Moreover, defendant now reveals that under its plan, all the uncovered actings would be dismissed outright. 42.9% of this group of 28 are minority. Half or more than half of them are in the unlicensed group excluded primarily because they had not served long enough to qualify for the examinations as of last April (Tr. Sept. 13, 1974, p. 5-6). This latter group, which includes 46% minority members, would be denied through their dismissal the opportunity to obtain licenses in future interim evaluations. (Final Judgment III.C).[1]

Defendant has not advanced any policy rationale for these aspects of its proposal, which is challenged in material respects not only by amicus

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1. The parties and Court have agreed that an apparently additional group of 13 to 19 individuals, whose interim evaluations are "unresolved" must be protected against any excessing until the disposition of their applications in November. (Tr. Sept. 13, 1974, p. 24-27) Under defendant's plan, any of these who failed would be added to the unlicensed group and dismissed out of hand despite the provision of the Final Judgment (para. III.C) authorizing continued employment and reexamination of unsuccessful applicants.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

New York City School Boards Association, whose members are in effect subsidiaries of defendant Board, but also the CSA, representing senior and junior members of the affected supervisors. On the other hand, data submitted show that the plan is clearly discriminatory against plaintiffs' class and adverse to this Court's interest in preserving the effectiveness of its decrees.

Prior to the preliminary injunction herein, the supervisory ranks of the city school system numbered at most 10% minority members. In the largest category affected by the excessing proposals, assistant principal, the percentage was only 7%... Only 1% of those serving as principal, to which assistant principalships are a stepping stone, were drawn from the minority group. Chance v. Board of Examiners, 330 F. Supp. 203, 208 (S.D.N.Y. 1971).

Three years after the preliminary injunction this staff still includes at best only 15% minority members. Given this background, it is evident that a seniority plan which has impact only on the group appointed pursuant to the Court's remedial orders, 27% of whom are minority, continues the discrimination held unconstitutional by the Court. The further plan to dismiss a group almost half of whom are minorities makes the first of potentially serious inroads against the work of integrating supervisory staff so slowly and laboriously begun as a result of this case.

Argument

1. THE BOARD'S DISCRIMINATORY PLAN IS NOT NECESSARY OR APPROPRIATE TO PROTECT ANY VALID INTEREST.

The invalidity of seniority rules which thwart decrees to remedy unconstitutional discrimination has been affirmed by the Court in the hearings on this matter. While the Court has also expressed understandable concern that modification of such rules not unduly jeopardize the earned prerogatives

of innocent individuals, the defendant Board's rule goes much farther than necessary to do such equity and is in its dismissal provisions completely irrelevant to that end.

As noted, the Board's perpetuation of existing seniority rules places the entire burden of excessing on the post-injunction appointees, who include an exceptionally high proportion of the supervisory staff's few minority members. At the same time it preserves a complete insulation from excessing of all pre-injunction appointees. The authorities do not require such total preservation of seniority expectations. Rather as discussed in our Memorandum of July 30,(Part I, p. I-3-4, Part III,)they permit reasonable accomodations necessary to serve the constitutional interest in undoing past discrimination. See also p. infra.

The Board's further determination to exclude from the purview of excessing the unappointed and unlicensed personnel assigned since the injunction is completely irrational. These devices protect no one except the licensed and appointed members of the same originally "acting" group. Many of the latter, as members of plaintiffs' class, are represented by plaintiffs' counsel and all are allegedly represented by the CSA, but none of their representatives have sought such protection for them at the expense of other actings.

The exclusion of the unappointed actings is apparently not even desired by defendant, so it is very difficult to see why defendant continues to include them in the excluded group.

Thus in para. 6, the affidavit of Frank C. Arricale invites the Court "to mandate licensed personnel be appointed immediately" thereby assuring that "an additional 13 persons would be in an excessed situation" and that

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

"[T]he very excessing rules we seek this Court to uphold would guarantee excessing rights for 48 of the 63 persons the Plaintiffs have mentioned."

Mr. Arricale's request, which must be puzzling to the Court, reflects an apparent change in the defendant's position regarding an ambiguous feature of the Final Judgment, upon which, as will be indicated in a separate letter to the Court, we hope to reach agreement and submit a joint proposed amendatory order for the Court's signature.[1] Mr. Arricale's statement makes clear,

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1. While the Judgment made clear(para. III) that persons passing interim evaluations pursuant thereto should be licensed forthwith and that such licensed persons were among the class authorized for appointment, it did not indicate whether special action by appointing authorities would be necessary to convert an assignment into an appointment when the assignee became licensed. As of the date of this Court's order of July 30, none of the parties had taken a formal position on the necessity or lack of necessity for such appointive action. The July 30 order para. IIIB required the Board to advise community boards of any steps necessary to assure that acting personnel who have obtained licenses***are 'appointed' in time to be covered***for purposes of any excessing in the September 1974 school term." The Board issued a memorandum to the boards dated August 12, 1974 providing, among other things, that since only "appointed" supervisors would have excessing rights under its proposed rules, they should "appoint as quickly as possible those [licensed] acting supervisors whom you wish to retain***." It added "because of the time constraints under which we are operating unless we are informed by August 20, 1974 which acting supervisors have been denied appointment, we will consider for the purpose of excessing all acting supervisors licensed under the Interim Licensing Procedure to have been 'appointed'." As indicated by Mr. Bernikow at the September 13 hearing, the Board now appears to agree with CSA that advice from community boards regarding non-appointment of personnel is somehow unreliable and not an equitable basis on which to deny any individual rights. (Tr. Sept. 13, 1974, p. 27-29; O'Brien aff.)

however, that the Board, like the CSA and plaintiffs deems the action or non-action of community boards in appointing individuals irrelevant to their status for purpose of excessing. Certainly that is true. Whether or not they do so by the device of non-appointment, boards can always dismiss personnel they deem unsatisfactory. Ed. Law § 2573.19b). The right to dismiss however, is traditionally independent of rights and obligations related to excessing, and the two should not be confused.

The exclusion from excessing protection of "unlicensed actings" is equally irrational. As noted, this group consists primarily of people who had not as of the cut-off date last April served in their acting positions long enough to be eligible for the interim evaluations.[1]

There is no apparent reason why these people should be denied the protection for excessing afforded to other previously "acting" personnel assigned pursuant to this Court's decrees. Particularly under the seniority system which defendant board would have the Court continue, their protection would simply give them the same rights as other actings to be retained in their present position as long as less senior assignees remained. On the facts as presented by the defendant Board, this would mean they all could be placed in some supervisory vacancy. Instead the Board would have them arbitrarily and unnecessarily dismissed. One effect would be to remove from the supervisory ranks a significant percentage of the minority people added as a result of this litigation. Another would be to prevent them from qualifying for licensing under the Interim Evaluation System which requires that they be

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1. A lesser number, unspecified, are said to have failed or have been otherwise ineligible. Such people if retained in their positions would be eligible to reapply at a later date. (Final Judgment, para. III.C)

on the job to qualify. Thus, the ranks of licensees eligible for future appointment to the system as well as all current supervisors would be decimated.

2. THE CSA AND SCHOOL BOARD ASSOCIATION PRESENTATIONS DO NOT RESOLVE THE EXCESSING PROBLEM.

As previously noted, neither the CSA, as union for all categories of supervisors, nor the Association representing community school boards supports defendants' excessing proposal. On the other hand, neither has presented an acceptable alternative for the Court's consideration.

In the affidavit of its President, Peter S. O'Brien, CSA suggests that excessing rules be extended to all actings who have served the minimum five month period necessary to give them the status of people eligible for licensing, in contrast to that of mere temporary assignees. If this approach were followed, 28 people now marked for termination would be injected into the seniority list to determine their relative order of excessing. CSA says no one would be terminated for this school year under such circumstances and all would retain "supervisory" positions. Even if that is true[1] the burden of position shifts, possible demotions and possible disadvantage from placement in another district than the one which hired an individual would still fall most heavily on new assignees. By perpetuating the traditional seniority system without making any allowance for the abnormally high incidence of less

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1. CSA's analysis includes an exaggerated projection of 141 vacancies (O'Brien aff. para 3) in contrast to the Board's report of 74, as well as sweeping statements that additional vacancies not considered in the Board's analysis, would be created by retirements and the appointment of A.P's to vacant principalships. None of these or the affidavit's many other broadside objectives has any demonstrated support.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

senior personnel among members of plaintiffs' class, the CSA plan uncompromisingly perpetuates the effects of racial discrimination.

The amicus School Boards Association has made no recommendation to the Court except that the inter-district aspect of the excessing be eliminated. Plaintiffs view inter-district transfers as a disadvantage which cannot be allowed to burden the members of their class unequally. Moreover, it is clear that there are many disadvantages in a system which disrupts the hiring patterns and practices of district authorities which this very Court has vested with significant independent discretion in defining criteria for selection. However, a bare suggestion that the inter-district features be eliminated gives no clue as to the character of any alternative procedures nor their impact on members of plaintiffs' class.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

3 Pending Development of an Acceptable Alternative Plan, the Court Should Enjoin Any Inter-District Excessing of Persons Assigned, Appointed or Licensed Since its Injunction of September 20, 1971.

The purpose of the Court's injunction issued July 5 was to preserve the status quo so that defendant could implement its proposal in the event it was shown to be harmless to the interests of plaintiffs and the Court's decrees in this case. In view of the clear demonstration that defendant's excessing plan would operate in an unconstitutional fashion, defendant should still be enjoined from implementing the plan. Plaintiffs are conscious, however, of the school system's need to proceed with the filling of vacancies on at least a temporary basis if school routine is to proceed. In the absence of any inter-district excessing plan which would preserve the rights of plaintiffs, we believe a new injunction is needed which would protect the interests of plaintiffs and the Court in safeguarding its own orders, while permitting the system to adopt compatible measures for addressing the excess and vacancy problems.

Plaintiffs accordingly urge the Court, as we did once before, to enjoin any excessing which would involve terminating or shifting into different positions or districts personnel appointed since the preliminary injunction of September 21, 1971. In the alternative form of order submitted to the Court on July 30, 1974 plaintiffs urged that such relief continue for three years until October 31, 1977. It was and remains our belief that such relief would protect plaintiffs' interests until a substantial degree of staff replacement, increasing the proportion of minority representation among supervisors, assured that reinstitution of seniority excessing would not reinstitute discriminatory employment patterns. Chance v. Board of Examiners, OPIN. Mansfield, J. December 27, 1973 page 12.

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

Such protective relief for the plaintiff's class would be compatible not only with prior Court orders in similar cases[1] but with reasonable efforts to honor the equities of individuals appointed prior to the preliminary injunction. Nothing in their order proposed would affect the relative seniority of such earlier employed persons vis a vis each other. In effect, a compromise would be struck preserving the rights of all but the least senior people appointed before the preliminary injunction.[2]

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[1] See, e.g., Watkins v. Steel Workers (USA), Local 2369 7CCH Emp. Prac. para. 9130, (E.D. La. 1974), Oliver v. School District of Kalamazoo, 346 F. Supp. 766, 782 (W.D. Mich 1971), Aff'd. 448 F. 2nd 635 (6th Cir. 1971)

[2] Nor, of course, would such an order tie the hands of any appointing authority wishing to dismiss an individual appointed subsequent to the injunction; boards would be free to dismiss supervisors at any time on the recommendations of their superintendents Ed. Law §2573.1.(b)

Plaintiffs' Supplemental Memorandum Regarding Application of Excessing Rules

Plaintiffs do not by this request imply that the relief proposed is the only acceptable approach to excessing available in the instant case. Judicial decisions discussed in our Memorandum of July 25 suggest a number of alternative ways to mitigite the resegregating effects of strict seniority excessing rules upon newly integrated staffs yet minimize the disappointment of seniority expectations among earlier appointees. Plaintiffs urged the defendants to consider such alternatives before this dispute was ever presented to the Court in July, and we believe that acceptable approaches would not be difficult either to develop or implement.[1]

Thus, plaintiffs urge that if the Court does not deem it appropriate to prohibit the excessing of post-injunction appointees for an extended specified period, it issue such an order temporarily, to remain in effect unless or until an acceptable excessing proposal has been devised by the parties and approved by the Court. Such an order would prevent the unconstitutional discrimination against plaintiffs and counterproductive unraveling of this Court's prior decrees without

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[1] For example, it might seem appropriate to modify traditional seniority rules by assigning persons employed since the Court's preliminary injunction a specified amount of incremental seniority in addition to that accumulated since the day of assignment. They would thus have status for excessing purposes comparable to that of pre-injunction appointees hired within say, three to five years before the injunction was issued. No pre-injunction employees would completely lose seniority and the most senior employees would be completely protected, but the effects of currently proposed systems on minority employment would be lessened. Another alternative might be for a limited duration to eliminate seniority rules entirely insofar as newer employees were concerned, while guaranteeing the most senior employees, of say 10 to 20 years service, against any excessing at all. Still another possibility would be to attach to a broadly applicable seniority system, such as the CSA has proposed, a proviso that if its implementation proved grossly discriminatory to minorities or post-injunction assignees, lay-off and transfers would be apportioned among the groups according to a previously determined formula. Plaintiffs, in the absence of defendant's cooperation and submission of pertinent data, are not positioned to assess the relative equities or educational implications of these or various other alternatives which have been suggested since the excessing issue came under discussion. We believe that if the Court issues the temporary restraint we propose further and fruitful discussions may well ensue.

impairing the opportunity of all concerned to affect a mutually agreeable accomodation.

Dated, September 25, 1974

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barclay being duly sworn, says that on the 30 day of April 1975, he served the annexed Joint appendix upon Rachell + Krueger Esqs the attorney for the amicus Curiae herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 230 Park Ave in the Borough of m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

30 day of April 1975 JOHN CALIA Stanley Barclay

John Calia

Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

Form 323-40M-703823(73) 346

1

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barclay being duly sworn, says that on the 30 day of April 1975, he served the annexed Joint - appendix upon Wayne J Schuler, Freedman, Esqs the attorney for the Bd of Examiners herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 425 Park ave in the Borough of m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

30 day of April 1975 JOHN CALIA Stan Barc

John Calia

Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
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Form 323-40M-703823(73) 346

2

AFFIDAVIT OF SERVICE ON ATTORNEY BY MAIL

State of New York, County of New York, ss.:

Stanley Barclay being duly sworn, says that on the 30 day of April 1975, he served the annexed Joint appendix upon Elizabeth B Du Bois Esq., the attorney for the Plaintiff-appellees herein by depositing a copy of the same, inclosed in a postpaid wrapper in a post office box situated at Chambers and Centre Streets, in the Borough of Manhattan, City of New York, regularly maintained by the government of the United States in said city directed to the said attorney at No. 271 Madison Ave in the Borough of m, City of New York, being the address within the State theretofore designated by him for that purpose.

Sworn to before me, this

30 day of April 1975 JOHN CALIA Stanley Barc

John Calia

Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
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